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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 237

STATE OF OHIO EX REL. E. H. BRYANT, APPELLANT,

vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY, F. A. SEIBERLING, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 12, 1929

(34,368)

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IN SUPREME COURT OF OHIO

No. 21,324

STATE OF OHIO ex Rel. E. H. BRYANT, Appellant,

v.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY, F. A. Seiberling, Edward D. Eckroad, Maude I. Milar and Jacob Mong, County Auditor, Appellees

PETITION FOR APPEAL—Filed June 13, 1929

To the Honorable Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio:

The petition of State of Ohio ex rel. E. H. Bryant, respectfully shows: That heretofore, towit, upon the 27th day of March, 1929, and upon the 5th day of June, 1929, there was rendered by this Court in the error proceedings entitled and bearing the docket number as above, a judgment affirming the judgments of the lower courts in a taxpayer's suit commenced in the Court of Common Pleas of Summit County, by the State of Ohio, ex rel. E. H. Bryant, against the Akron Metropolitan Park District for Summit County, F. A. Seiberling Edward D. Eckroad Maude I. Milar and Jacob Mong, County Auditor, for injunction against the levying of taxes and the completing of contracts by said Park District Commissioners, in which proceeding and in the error proceedings for the review thereof in the Court of Appeals of Summit County, and in this court, there was drawn in question the validity of the "Park District Act" of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive, (107 Ohio Laws, pages 65 to 69), and the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental sections, 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097 to 1100), on the ground of their being repugnant to the provisions of Article XIV, Section 1 of the amendments to, and of Article IV, Sections 2 and 4, of the Constitution of the United States in respect to the breach of the privileges and immunities and other rights of citizens, and of the guaranteed form of State gov-
[fol. 3] ernment, by the vesting of the taxing and other leg-

islative powers of the State of Ohio in nonelective officials of that State; and there was further drawn in question the validity of Section 2 of Article IV of the Constitution of Ohio on the ground of its being repugnant to the provisions of Article XIV, Section 1 of the amendments to the Constitution of the United States in regard to the denial of the equal protection of the laws by the Ohio Supreme Court's rendering of minority judgments on constitutional questions, and the decision in each of said matters was in favor of the validity of said statutory and constitutional provisions of the State of Ohio,—there being manifest error in the premises greatly to the damage of this appellant in refusing such injunction.

Appellant further shows that the said judgment of the Supreme Court of Ohio was and is a final judgment of the highest court of the State of Ohio in which a decision in said suit could or can be had; that a federal question was made in said case, towit, as hereinbefore set out; and that said judgment of said Supreme Court of Ohio was and is repugnant to, and in conflict with, the Constitution of the United States to which the said judgment of the Supreme Court of Ohio was contrary, albeit a decision of the said federal question was necessary to the judgment rendered; all of which more fully appears in the Assignment of Errors filed herewith.

Wherefore, said appellant presents herewith an exemplified transcript of the record of the Supreme Court of Ohio in said case and prays that an appeal from said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved as security for costs.

State of Ohio ex Rel. E. H. Bryant, by Frederick A. Henry for George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, Williamson Bldg., Cleveland, Ohio, Attorneys for Appellant.

[fol. 4] The appeal as prayed for in the foregoing petition is hereby allowed and the bond for security for costs tendered therewith is hereby approved.

Dated at Columbus, Ohio, this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 13, 1929

The appellant in the above entitled suit having prayed for the allowance of an appeal in this case to the Supreme Court of the United States from the judgment and order or orders made and entered in the above entitled suit by the Supreme Court of the State of Ohio on the 27th day of March, 1929, and on the 5th day of June, 1929, and from each and every part thereof, and having present on file their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statute and to the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered, That an appeal be, and the same is hereby allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this case and transmit the same to the Supreme Court of the United States, and he shall have the same in said Court within thirty days from this date.

And it is further ordered that the surety for costs on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

Dated this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 7] [File endorsement omitted.]

[fol. 8] IN SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 13, 1929

The appellant, State of Ohio, ex rel. E. H. Bryant, files this assignment of errors to be reviewed by the Supreme

Court of the United States on appeal from the Supreme Court of Ohio; said Supreme Court of Ohio having erred in the above entitled case in finding and deciding as follows:

1. That, "it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ.) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, C. J., and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed."

2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void," does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to "deny to any person within its jurisdiction the equal protection of the laws."

[fol. 9] 3. That the "Park District Act" of the State of Ohio, General Code Sections 2976-1, to 2976-10c, inclusive, (107 Ohio Laws, pages 65-69) and the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States, or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws: and that neither said Act nor any of said sections, by

delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state.

Wherefore, said appellant prays that the foregoing assignment of errors be allowed by this court, and that the judgment and order or orders of this court may, by reason thereof, be reversed by the Supreme Court of the United States.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

Allowed this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fols. 10 & 11] [File endorsement omitted.]

[fols. 12-17] Citation in usual form showing service on Oscar A. Hunsicker et al. Filed July 3, 1929. Omitted in printing.

[fol. 18] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET AND JOURNAL ENTRIES

Transcript of Docket Entries

Memoranda of Pleadings, etc., filed, writs issued, judgments decrees and orders.

1928.

Aug. 2. Petition in error and præcipe for summons filed. Transcript of docket and Journal entries of Court of Appeals and Common Pleas Court, and original papers filed. Summons issued for defendants in error to sheriff of Summit County, Ohio, returnable August 13, 1928, Sent by registered mail., P. O. Receipts.

1928

Aug. 14. Summons returned endorsed as follows: "Sheriff return received this writ August 3, 1928 at 3:20 o'clock P. M. and on August 6, 1928 I served the same by personally handing a true and certified copy thereof with all the endorsements thereon to F. A. Seiberling, Edward D. Eckroad, Akron Metropolitan Park by Edward D. Eckroad as chairman. Then after due and diligent search I am unable to find the within named Maude I. Milar and Jacob Mong in my County. Jacob Bollinger, Sheriff, R. E. Martin, Deputy Sheriff.

Aug. 31. Papers sent to Gates Legal Publishing Co. by express.

Sept. 1. At Chambers—Time for filing printed record and printed brief of plaintiff in error extended until September 15, 1928. R. H. Day, J. Journal #31 Page 437.

Sept. 12. Papers returned by Gates Legal Publishing Co. Printed Record filed 9/12/28 P. S. Filed

Sept. 19. Plaintiffs printed briefs (same as 21336) filed 9/21/28 P. S. Filed.

Nov. 30. Deft's Printed Briefs (same as 21336) filed 12/1/28 P. S. Filed.

Dec. 11. Printed reply briefs of plaintiff (same as 21336) filed.

" 14. Proof of Service of plaintiff's reply brief filed.

" 20. Printed briefs, amicus curiæ by George C. Hansen, (same as 21336) filed, and sent to Court 12/26/28 P. S. Filed.

1929.

Feb. 22. Printed briefs of Henderson, Quail, McGraw and Morgan, Amicus curiaw filed (same as #21336) 2/26/29 P. S. Filed.

Mar. 27. Reargument Judgment Affirmed, Journal #31 Page 614.

Apr. 3. Mandate Issued.
Original Papers sent to Clerk.

Apr. 26. Application for rehearing filed ans sent to Court.

May 25. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error, briefs on motion, notice and proof of service filed.

1929

Jun. 5. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error, Overruled, Journal #31.—683.

June 13. Petition for allowance of an appeal to Supreme Court of United States filed.

Order Allowing Appeal filed. Assignment of errors filed.

Bond in sum of $500.00 signed by E. H. Bryant as principal, Royal Indemnity So. as Surety filed and approved.

[fols. 19-21b] Transcript of Journal Entries

1928.

Sept. 1. Upon application of plaintiff in error, and for good cause shown it is ordered that the time for filing printed record and printed brief of plaintiff in error, herein be, and the same hereby is extended until September 15, 1928.

1929.

Mar. 27. This cause came on to be hear- upon the transcript of the record of the Court of Appeals of Summit County and was argued by counsel. On Consideration whereof, it appearing that five members of this Court, (Robinson, Jones, Matthias, Day and Allen, JJ) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, and 2976-10i of the General Code of Ohio are unconstitutional that two members (Marshall, C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional, and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed, and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

1929 It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended taxed at $——.

Ordered, That a special mandate be sent to the Court of Common Pleas of Summit County to carry this Judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Court of Appeals of Summit County, "for entry."

June 5. It is ordered by the Court that this motion be and the same is hereby overruled.

[fol. 22] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed Aug. 2, 1928

Plaintiff in error, in the above entitled cause, says that on the 24th day of May, 1928, that the Court of Appeals for the Ninth Judicial District of Ohio in an error proceedings then pending therein and prosecuted by this plaintiff in error thereto from a judgment of the Court of Common Pleas of Summit County, Ohio, rendered against this plaintiff in error and in favor of the defendants in error, which said Court of Appeals, on the aforesaid date, affirmed and rendered judgment against this plaintiff in error and in favor of the defendants in error.

That constitutional questions are involved in the above entitled action which authorizes the plaintiff in error to [fol. 23] prosecute this proceeding in error to this Court that he may have the proceeding of the Lower Courts reviewed.

That the original files and pleadings, together with a cerified copy of the docket and Journal Entries of the Lower Courts, are filed herewith and present the constitutional questions presented and decided adversely to plaintiff in error's contention.

Plaintiff in error therefore prays that said judgments of the Lower Court be reversed and that he be restored to all things and rights he has lost thereby.

Geo. D. Hile, Snyder, Henry, Thomsen, Ford & Seagrave, Attorneys for Plaintiff in Error.

Precipe

To the Clerk of Supreme Court:

Please issue summons in error for the defendants in error, returnable according to law.

Geo. D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, Attorneys for Plaintiff in Error.

Aug. 2, 1928. Summons issued. L. J. C.

[fol. 24] In Court of Appeals of Summit County

No. 1414

Docket and Journal Entries

October 14, 1927.—Petition-in-Error, Transcript from Common Pleas Court and ten (10) original papers and Precipe filed.

October 14, 1927.—Summons in error issued to Sheriff of Summit County.

October 25, 1927.—Summons in error returned endorsed: I served the same Oct. 22, 1927, by personally handing a true and certified copy thereof with all the endorsements thereon to Edward D. Eckroad, Maude I. Milar, Jacob Mong, County Auditor, and Akron Metropolitan Park by Edward D. Eckroad, President. And after due and diligent search I am unable to find the within named F. A. Seiberling in my County. Jacob Bollinger, Sheriff. R. E. Martin, Deputy Sheriff.

November 12, 1927.—Motion to advance, acknowledgment of service of notice and Brief filed.

November 15, 1927.—October Term. This cause came on to be heard upon the motion of plaintiff to advance the same, and it appearing to the court that the issues made in said case by the pleadings are now before the Supreme Court for determination in another case pending therein, which has been argued and submitted, said motion to advance is overruled. Jl. 4-149.

January 9, 1928.—Motion to advance, acknowledgment of service of notice and brief filed.

[fol. 25] March 16, 1928—Brief (1) plaintiff in error filed.

April 13, 1928.—Brief (3) Board of Park Commissioners of The Akron Metropolitan Park District filed.

April 16, 1928.—October Term. It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

May 24, 1928.—April Term. Judgment affirmed. Error from Common Pleas.

The said parties appeared by their Attorneys, and this cause came on to be heard upon the Petition in Error of the said State of Ohio, ex rel. E. H. Bryant, plaintiff in error herein, together with the original papers and pleadings and a duly certified Transcript of the orders and Judgment of the Court of Common pleas of Summit County, Ohio, filed therewith in the said cause, wherein State of Ohio, ex rel. E. H. Bryant, was plaintiff and Akron Metropolitan Park District for Summit County, F. A. Seiberling, Edward D. Eckroad, Maude I. Milar and Jacob Mong, County Auditor, were defendants, mentioned and referred to in said Petition in Error, and was argued by counsel: Upon consideration whereof the Court finds that there is no error manifest upon the face of the record in said orders and Judgment of said Court of Common Pleas.

It is thereupon Considered, Ordered and Adjudged by this Court, That the Judgment and proceedings of the said Court of Common Pleas, in said cause in favor of the said defendants in error, and against the said plaintiffs in error be, and the same are hereby in all things affirmed, there being, however, in the opinion of the Court, reasonable ground for this proceeding in error.

[fol. 26] It is further Considered and Ordered, That the plaintiff in error pay the costs of this proceeding in error, taxed at —, and in default thereof that execution issue therefor.

Ordered, That a special mandate be sent to the Court of Common Pleas of Summit County, to carry this Judgment into execution.

To all of which the plaintiff excepts. Jl. 4-, —.

May 25, 1928.—Precipe for Transcript to Supreme Court filed.

(Duly certified.)

IN COURT OF APPEALS OF SUMMIT COUNTY

PETITION IN ERROR—Filed Oct. 14, 1927

The plaintiff in error says on the 5th day of August at the April 1927 term of the Common Pleas Court of Summit County, Ohio, in Case No. 62487, on the Dockets of said Court in an action therein then pending wherein this plaintiff in error was plaintiff and the defendants in error were defendants, that the court under and upon the allegations of facts set forth in plaintiff's amended petition, which facts are admitted by defendant'se answer filed thereto, it was by said court considered, determined and adjudged that plaintiff's amended petition be dismissed, which the court did and entered judgment in favor of the defendants and against this plaintiff, to all of which plaintiff excepted.

That a transcript of the docket and journal entries thereof together with the original papers are filed herewith.

[fol. 27] The plaintiff in error says that there is error in said judgment and proceedings in this to-wit:

First. That judgment should have been rendered in favor of the plaintiff on the facts admitted by the pleadings.

Second. That said judgment is contrary to law.

Third. That the court erred in rendering judgment in favor of the defendants when it should have been rendered for the plaintiff.

Fourth. That said judgment is contrary to the law of the land, violating fundamental law of the land, that taxation and representation are inseparable.

Fifth. That said judgment denied the plaintiff in error of the protection of the constitutional provisions set forth in its petition.

Wherefore the plaintiff prays that the court reverse the judgment of the lower court herein rendered and that he be restored to all things lost thereby.

Geo. D. Hile, Attorney for Plaintiff in Error.

Precipe

To the Clerk:

Issue summons in error for the above named defendants in error. Endorse returnable according to law.

Geo. D. Hile, Attorney for Plaintiff in Error.

Issued Oct. 14, 1927.

[fol. 28] In Common Pleas Court of Summit County

Docket and Journal Entries

December 29, 1926.—Petition, Affidavit and Precipe filed.

December 30, 1926.—Summons issued to the Sheriff of Summit County.

January 3, 1927, September Term.—It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

January 4, 1927.—Summons returned endorsed: And on 31st Dec. 1926, I served the within named "Akron Metropolitan Park District" by H. S. Wagner, Treas., and Jacob Mong. Chris Weaver, Sheriff. H. Lesher, Deputy. And on Jan. 4th, 1927, Frank A. Seiberling and Edward D. Eckroad by personally handing to each of them a true and certified copy thereof with all the endorsements thereon. And on Jan. 4, 1927, I served the within named Maude I. Milar by leaving for her at her usual place of residence, a true and certified copy thereof with all the endorsements thereon. Jacob Bollinger, Sheriff. By C. Hixon, Deputy.

January 14, 1927.—Motion for security for costs and Brief filed.

January 25, 1927.—Motion for advancement and Brief filed.

January 25, 1927.—Answer filed.

January 28, 1927.—Undertaking for Costs filed.

[fol. 29] February 17, 1927, January Term.—Plaintiff, on his own motion, is given leave to file his amended petition, instanter. Jl. 128—571.

February 17, 1927.—Amended Petition filed.

March 2, 1927.—January Term. It appearing that an amended petition has been filed by the plaintiff, the de-

fendants, on their own application, are given permission to refile the answer heretofore filed by them in this action as an answer to the amended petition without the reverification thereof and without the doing of any formal act. Jl. 129—36.

April 4, 1927, January Term.—It is ordered by the court here that this cause be and the same hereby is continued to the next term of this court.

August 5, 1927, April Term.—This day this cause came on to be heard on the issues joined in the pleadings and admissions therein contained and was argued by counsel and submitted to the Court.

On consideration thereof the Court finds the issues in favor of the defendants and that the petition should be dismissed.

Now, therefore, it is the judgment of the Court that the restraining orders prayed for in the petition be, and they hereby are refused and the petition is hereby dismissed, at the costs of the relator. To all of which plaintiff excepts. Jl. 132—28.

(Duly certified.)

[fol. 30] In Common Pleas Court of Summit County

Amended Petition—Filed Feb. 17, 1927

Having first obtained leave Plaintiff files this amended petition and says that he is one of the taxpayers of Summit County, Ohio, that he has no taxable property within the Township of Twinsburg, nor the Village of Hudson, that he brings this action as a taxpayer of said County for the benefit of said County, after having on the 16th day of December, 1926, made written demand upon Walter Booth, the Prosecuting Attorney for said County, that he institute this action and after his refusal to do same in writing. Plaintiff for his complaint and cause of action says, that Jacob Mong is the duly elected and qualified auditor for Summit County, Ohio, that the defendants Frank A. Seiberling, Edward D. Eckroad and Maude I. Milar constitute the Board of Park Commissioners for the Akron Metropolitan Park Districts, a defendant herein. That an ap-

plication for its establishment was filed in the Probate Court of Summit County, Ohio, on or about the 30th day of August, 1921, by C. B. Stebins, J. R. Albright and D. A. Eley, then the Trustees of Boston Township in said County, who as such Trustees prior thereto, had passed a resolution for the establishing of the aforesaid Metropolitan Park District under such style and name, which district was to include all of Summit County, excepting the Township of Twinsburg, that said application for its establishment was accompanied with a map or plat required by the statutes hereinafter mentioned. That on or about the first day of January, 1922, the Probate Judge of Summit County entered an order establishing the Akron Metropolitan Park District for Summit County, embracing all of the [fol. 31] territory thereof, excepting the Township of Twinsburg and Village of Hudson.

Plaintiff says that the Akron Metropolitan Park District is established under and by virtue of an act passed by the General Assembly of Ohio on March 6th, 1917, volume 107 Ohio Session Laws, page 65, and an act passed by said legislative body on April 9, 1919, volume 108 Ohio Session Laws, part 2, page 1097, and that the said Frank A. Seiberling, Edward D. Eckroad and Maude I. Milar, defendants, herein hold their respective positions as Commissioners of said Park District by virtue of the aforesaid legislation, which is embraced in sections 2976-1 to and including section 2976-10 I of the General Code of Ohio, which legislation is illegal and void, being special acts conferring corporate powers in violation of section one, article 13, of the Constitution of Ohio. That section 2976-4 G. C. confers upon and requires the Probate Judge of Summit County to determine whether the creation of the said Park District would conserve the public welfare and also empowers said Judge to determine the geographical boundary of said Park District, both of which called upon the said Judge to determine political questions instead of deciding judicial questions. That section 2976-5 G. C. confers upon the Probate Judge the right and duty to appoint three persons as Park Commissioners for the said Metropolitan Park District, when established, and which he did. That section 2976-7 G. C. declares that said Board of Park Commissioner shall be a body politic incorporate in violation of section 2, article 13, of the Constitution of Ohio.

[fol. 32] Plaintiff says the defendants, Park Board Commissioners, do not constitute, or represent, a Municipal Corporation, a Township, or a County recognization, or authorized under the Constitution and Laws of Ohio. That said legislation, herein complained of, confers upon said Park Board Commissioners power ex officio to destroy any Township or County political organization by simply acquiring all, or nearly all, the territory therein, which when acquired the real estate therein becomes non-taxable. That by section 2976-7 the Park Board Commissioners are empowered to acquire land outside of the park districts, as now established, and outside of the County of Summit, which the taxpayers in the said Metropolitan Park District are required to pay for. Plaintiff says that the said Park Board Commissioners do not constitute a political body, nor represent a political district, recognized or permitted by, or under, the laws of the Constitution of Ohio.

The plaintiff says that by the provisions of 2976-10 G. C. the defendant Park Commissioners have conferred upon them the absolute power to levy taxes within such park district in an amount not in excess of one-tenth (1/10) of one mill upon each dollar of the assessed value of the property in the aforesaid district, in any one year, subject, however, to the combined maximum levy for all other purposes, provided by law, which the county budget commission is to determine and then certify said facts to the county auditor, who is required by said section to place said tax upon the tax duplicate, and when certified said Park Commissioners may anticipate the collection of said taxes so levied, and are empowered to issue their negotiable notes, not in ex- [fol. 33] cess of 75% of the proceeds of such tax, which notes shall not be for a longer period than one (1) year.

Plaintiff says that by the provisions of 2976-10 B. G. C. the county auditor and county treasurer are made ex officio officers of said Park Board, and the auditor when required by said Park Board Commissioners is required to issue his warrants upon the county treasurer for the disbursement of funds derived from the taxes levied by said Park Board Commissioners. That section 2976-10 D empowers said Park Board Commissioners to have land annexed to said Park District, as now established, that lies in counties adjacent to Summit County, and that the county auditor and treasurer in said counties where land may be annexed

are made subject to the provisions of section 2976-3 and 2976-4 G. C. That section 2976-10 g G. C. delegates to said Park Board Commissioners power to pass such by-laws, rules or regulations, as they may deem it advisable for the preservation of good order within, and adjacent, to said Park District, which is unconstitutional, being a delegation of legislative power to a non-political body not recognized or permitted under the Constitution of Ohio, violating section one, Article 2, thereof. Plaintiff says that said legislation herein complained of confers upon the Probate Judge the right to appoint persons as members of said Park Board who are not required to be electors, or even citizens of the Park District under their control. That none of the defendant Park Board Commissioners have been elected, or are required to be elected, by said acts, and are not representatives of the taxpayers who are required to pay the taxes said legislation authorizes them to levy. All of which is contrary to and in violation of the [fol 34] fundamental law of the land; the Constitution of Ohio, and the Constitution of the United States, that taxation and representation are inseparable.

Plaintiff says that none of the electors or citizens of township, other than in Twinsburg Township, Summit County, can avail themselves of the right conferred by the Act of April 17, 1925, 111 Ohio Session Laws, 504, as said act cannot be given or have uniform operation throughout Summit County, by reason of the establishment of the aforesaid Park District, which violates section 26 of Article 2 of the Constitution of Ohio, and constitutes a denial of the equal protection or benefit of the laws guaranteed by section one of the 14th Amendment to the Constitution of the United States. That under provisions of section one, Article 2, of the Constitution of Ohio the General Assembly cannot delegate to non-elective bodies, or persons, the power to levy taxes, and that said legislation violates section 7, of Article 10, of the Constitution of Ohio. That by the provisions of said act, herein complained of, the county auditor and treasurer are made the ministerial officers or agents of the defendant Park Board Commissioners.

Plaintiff says the County Budget Commission for Summit County has, or is about to and will determine

that said Park Board Commissioners can and will, under the provisions of the said legislation and the statutes of Ohio, be entitled to levy on all property, in said Park District for the year 1927 about one eight hundredths of a mill of a tax, which will aggregate for said year about $40,000.00 and which levy the county auditor, Jacob Mong, [fol. 35] is about to, or has, placed upon the tax duplicate of said county for said year, and that the defendants, Park Board Commissioners, can, in anticipation of said taxes levied, issue notes of said Board as authorized by said legislation to secure funds for carrying on its activities, and which it will do as plaintiff alleges unless restrained and perpetually enjoined plaintiff says the defendants, Park Board Commissioners, have been issuing orders to auditor of Summit County for the payment of bills incurred by it, and that he has issued his warrants upon the county treasurer for said purpose and will continue to do so unless restrained and enjoined. Plaintiff says that he has no legal remedy of law to prevent the things herein complained of being done by the defendants under and by virtue of the aforesaid legislation, and appeals to the court of equity to prevent said act being done all of which are contrary to the aforesaid provisions of the Constitution and the fundamental law of the land.

Wherefore, Plaintiff asks the court upon the final hearing of this cause that the court find and declare the legislation hereinbefore mentioned to be illegal, unconstitutional and void. That defendants, Frank A. Seiberling, Edward D. Eckroad, and Maude I. Milar, be perpetually enjoined from exercising any of the powers conferred upon them by the legislation hereinbefore complained of and set forth in this petition, and that they be enjoined from levying any taxes upon property within the Akron Metropolitan Park District of Summit County, or issuing any further orders for the payment of obligations incurred by them upon the defendant's order, Jacob Mong, auditor, who is asked to be restrained and perpetually enjoined from issu- [fol. 36] ing any further warrants upon the county treasurer for the purpose of paying any obligations incurred by said Park Board Commissioners, and that he, as auditor, be

restrained and enjoined by placing upon the tax duplicate any taxes levied by said Park Board Commissioners for the year 1927, or any levied thereafter by said Park Board Commissioners, and that plaintiff be granted such other and further relief that the court of equity may find necessary and proper to prevent the illegal acts herein complained of.

Geo. D. Hile, Attorney for Plaintiff.

Duly sworn to by E. H. Bryant. Jurat omitted in printing.

In Common Pleas Court of Summit County

Answer—Filed Jan. 25, 1927. Refiled March 2, 1927

Now come the defendants in the above entitled action and for a joint answer to the matters and things alleged in the petition admit as follows:

[fol. 37] 1. That plaintiff is a tax payer in Summit County as alleged in the petition.

2. That plaintiff made written demand on Walter Booth, prosecuting attorney of Summit County, to institute this action and that the said prosecuting attorney refused so to do, in writing.

3. That the defendant, Jacob Mong, is the duly elected and qualified auditor of Summit County, Ohio.

4. That the defendants, Frank A. Seiberling, Edward D. Eckroad and Maude I. Milar are the members of the Board of Commissioners of the Akron Metropolitan Park District of Summit County, Ohio.

5. That said The Akron Metropolitan Park District of Summit County, Ohio, was established on the application of the trustees of Boston Township pursuant to an application filed in the Probate Court of Summit County, Ohio, on or about August 30, 1921, and that the order establishing said The Akron Metropolitan Park District was entered on or about December 31, 1921, by the Probate Court of Summit County.

6. That said The Akron Metropolitan Park District embraces the whole of Summit County excepting the Township of Twinsburgh and Village of Hudson.

7. That said The Akron Metropolitan Park District was established under and by virtue of an act of the General Assembly passed March 6, 1917, found in Volume 107 Ohio Laws at Page 65, and an act passed on April 9, 1919, and found in Volume 108 Ohio Laws, Part 2nd, at page 1097.

8. That the Budget Commission of Summit County, Ohio, has determined upon a tax levy to be made, which levy will [fol. 38] be placed upon the tax duplicate by the defendant, Jacob Mong, County Auditor, and will be collected in due course and paid out by the County Treasurer, pursuant to certificates and authorizations in the form required by law.

Further answering, defendants say they have a joint and common interest in this action and therefore offer this answer in behalf of all of the defendants. The defendants deny the following allegations, to-wit:

1. The defendants deny each and all of the several allegations in the petition alleging that the enactments of the Legislature of the State of Ohio under which said The Akron Metropolitan Park Board was created and exists, are illegal, void or in contravention to any of the provisions contained in the Constitution of the State of Ohio.

2. Defendants deny each and all the several statements in the petition alleging that the enactments of the Legislature of the State of Ohio under which The Akron Metropolitan Park Board of Summit County was created or is operating, are in contravention of any of the provisions of the constitution of the United States.

3. Defendants deny that any of the enactments of the Legislature of the State of Ohio under which The Akron Metropolitan Park Board was created or is operating are in contravention to the fundamental law of the land.

4. Defendants deny each and every material allegation in the petition not herein admitted to be true and not herein qualified.

[fols. 39 & 40] Wherefore, having answered the matters and things alleged in the petition, defendants pray that the said petition may be dismissed and that they may be allowed to go hence and recover their costs herein made.

Myers & Dinsmore, Attorneys for The Akron Metropolitan Park District, Edward D. Eckroad, Maud I. Milar and Frank A. Seiberling. Oscar A. Hunsicker, Prosecuting Attorney, Attorney for Jacob Mong, County Auditor.

Duly sworn to by Edward D. Eckroad and Jacob Mong. Jurats omitted in printing.

[fol. 41] IN SUPREME COURT OF OHIO

(Nos. 21324 and 21336—Decided March 27, 1929.)

THE STATE ex Rel. BRYANT

v.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY et al.

Error to the Court of Appeals of Summit County

THE STATE ex Rel. WADSWORTH, a Taxpayer,

v.

ZANGERLE, AUD., et al.

Error to the Court of Appeals of Cuyahoga County

Constitutional law—Park district act—Section 2976-1 et seq,. General Code—Constitutionality affirmed by two Judges of Supreme Court—Legislative powers not delegated to administrative bodies—Political and executive powers not delegated to judicial officers—Appointive officers may levy taxes.

The facts are stated in the opinion.

Mr. Geo. D. Hile and Messrs. Snyder, Henry, Thomsen, Ford & Seagrave, for plaintiffs in error.

Messrs. Myers & Dinsmore and Mr. O. A. Hunsicker, for defendants in error in No. 21324.

Mr. Edward C. Stanton, prosecuting attorney, Mr. E. J. Thobaben and Messrs. Locher, Green & Woods, for defendants in error in No. 21336.

[fol. 42] OPINION

MARSHALL, C. J.:

These two error proceedings, filed in this court as of right, involve the same or similar questions of constitutional law, and have therefore been argued together and will be disposed of in one opinion. Each was begun as a taxpayer's suit, attacking the constitutionality of the Park District Act, General Code Sections 2976-1 to 2976-10c, inclusive (107 O. L., 65-69), and the amendments thereto, Sections 2976-1 and 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 O. L., pt. 2, 1097-1100). Incidentally, the litigation in each instance involves questions of the lawful existence of the two metropolitan park boards organized under and pursuant to said statutes, in Cleveland and Akron, respectively.

In cause No. 21324, here on error from the Court of Appeals of Summit county, that court had affirmed the judgment for the defendants pronounced in the court of common pleas upon the pleadings, which joined issue upon the constitutional objections alleged by the taxpayer against said stautes. In cause No. 21336, here on error from the Court of Appeals of Cuyahoga county, that court heard the case on appeal from the court of common pleas of that county and rendered judgment for the defendants, with separate findings of fact and conclusions of law. In each case, the prayer of the petition was that the officers of the district park boards be enjoined from incurring obligations requiring the expenditure of public funds, or from exercising any of the powers conferred upon them by said statutes, and, more especially, that they be enjoined from levying any taxes upon property within the respective park districts, on the ground that all such statutes were unconstitutional and void.

[fol. 43] Section 2976-1, as amended, provides for park districts for the conservation of the natural resources of

the state, and further provides that such districts may include all, or a part only, of the territory within a county, if existing townships or municipalities are not divided.

Section 2976-2 provides that application may be made to the probate judge to create a park district, which application shall state the name of the district, contain accurate descriptions of the territory to be included, and be accompanied with an accurate map or plat.

Section 2976-3 provides for notice of the time of hearing such application.

Section 2976-4 provides for the hearing and taking evidence, as in other civil cases in said court and provides, that, if the judge finds that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application.

Section 2976-5 provides that upon creation of such district the probate judge shall appoint three commissioners, who shall take oath and give bond, and who shall serve without compensation, except the allowance of actual and necessary expenses.

Section 2976-6 provides that such board shall be a body politic and corporate and shall be capable of suing and being sued.

Section 2976-7 confers upon such board power to acquire "lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, [fol. 44] parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 2976-8 authorizes such park board to take control of any municipal park or park lands within the district by agreement with the authorities controlling the same.

Section 2976-9 provides: "In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in

excess of fifty per cent of such total cost, upon abutting, continguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable."

Section 2976-10 provides: "Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill [fol. 45] upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate, and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent. of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill."

Section 2976-10a provides for the disposition of records, surveys, and other property, including treasury balances required by laws superseded by these acts.

Section 2976-10b provides for the custody, accounting, depositing, and disbursement of park board funds, and requires the auditor's certificate of money in hand to pro- [fol. 46] vide for contracts before becoming effective.

Section 2976-10c provides for removal of commissioners at the discretion of the probate judge, either upon complaint filed or upon his own motion, and for the appointment of successors.

Section 2976-10d provides for annexation to a park district of territory adjacent and contiguous thereto, whether located within or without the county wherein such district was created.

Section 2976-10e provides, in case of annexation to a park district of territory located in a county other than a county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by Section 2976-10, and the auditor and treasurer of the county in which such annexed territory is located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon auditors and treasurers by Section 2976-10b.

Section 2976-10f provides that park boards may sell lands on approval by the probate judge.

Section 2976-10g gives to such boards power to adopt by-laws, rules, and regulations, and further provides that the violation of any such by-laws, rules, and regulations shall constitute a misdemeanor punishable by fines.

Section 2976-10h provides that such employes of the board as may be designated for that purpose shall have and exercise the powers of police officers within and adjacent to the lands under the jurisdiction and control of the board.

[fol. 47] Section 2976-10i provides: "Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board

of deputy state supervisors and inspectors of elections in each county in which any part of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition to the taxes authorized by Section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further that the amount of bonds so [fol. 48] issued and outstanding at any time shall not exceed one per cent of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the Industrial Commission of Ohio as provided by law."

While the petitions attack the constitutionality of Sections 2976-10g and 2976-10h, we shall give no consideration to those sections, because it does not appear that either of the boards involved in these error proceedings has ever attempted to enact by-laws, rules, and regulations, or to constitute any of their employees police officers, or to prosecute violators of said by-laws, rules, and regulations. The provisions particularly challenged and to which we shall direct our attention are Sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i.

There can be no question of the power of the General Assembly to establish park districts and boards of park

commissioners, and to define their powers. No one would question the right of the General Assembly to levy a state tax to establish and maintain state parks and reserves, and to appoint commissioners to care for them. This right has freely been exercised in the past. These are institutions in which all the people of the state are presumably interested and by which they are benefited. Cities have freely exercised these rights, and the state has likewise, though rather sparingly, exercised them. District parks and boards of park commissioners are institutions [fol. 49] which differ from state institutions only in the range of the interest and benefit. By the legislation now under consideraton provision has been made for park districts, whose benefits are more general than those of the cities and more local than those of the state. The power of the General Assembly to establish any of them is no longer doubted. This proceeding does not question the power of the Legislature to establish park districts. The attack is upon the methods by which they are established, and by which park boards are created, and upon the powers conferred on them. The case of McNab v. Board of Park Comm'rs, of Metropolitan Park Dist. in Cleveland, 108 Ohio St., 497, 141 N. E., 332, held that the statutes under which the Cleveland Park Board was established were enacted under the broad legislative power conferred upon the General Assembly and in the exercise of the state's general police power, and the only consideration given in that case to Section 36 of Article II of the Constitution, (the amendment of 1912), was to declare that that amendment did not operate as a limitation upon general legislative power. The discussion of the state's police power in the opinion in that case need not be further elaborated here. While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made. This proceeding challenges the constitutionality of the various statutes because of alleged delegation of legislative powers to executive bodies, and alleged delegation of political and executive powers to judicial bodies. The first challenge we shall notice is di- [fol. 50] rected to the power conferred upon the probate judge to appoint park commissioners and to exercise the functions of molding the confines of the area affected and

erecting the same into a park district. It is alleged that the appointing power is an executive function, and the establishment of the confines of the district a legislative function, and that both are nonjudicial.

The Constitution of Ohio has delegated to the General Assembly the legislative authority of this state. This authority is only subject to the express limitations found in the Constitution itself and the implied limitation that it must fall within the scope of legislative authority, as distinguished from judicial and executive authority conferred upon other departments. Except for the provisions relating to the initiative and referendum, all legislative authority of the state must be exercised by the General Assembly alone.

The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling influence over the others. It was declared by Madison before the adoption of the United States Constitution: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To provide a practical security for each against the inva- [fol. 51] sion of the others was felt by the early founders of our government to be a most important, as well as a most difficult task. The State Constitutions of many of the states, adopted immediately after the federal Constitution went into effect, declared in strong terms that the powers of government ought to be forever separate and distinct from each other, and yet not one of them faithfully observed its own solemn injunctions, but made provision for certain powers to be exercised by departments other than those to which they properly belonged. Other states, including Ohio, and the federal government, made no such declaration, and while the powers have in fact been assigned to the three departments, no barriers have been provided between them, and no injunction declared against invasions or surrenders.

Our own Constitution contains many instances of conferring powers upon departments foreign to their true classification. The Constitution of 1802 provided for judges to be chosen by the Legislature. Our present Constitution gives to the Governor the veto power. The Lieutenant Governor presides over the Senate. The House of Representatives has the sole power of impeachment, and impeachments must be tried by the Senate. The Governor may convene the General Assembly in extraordinary session and limit the deliberations of such session. In case of disagreement between the two houses, he may adjourn them. The executive prerogative of pardon is in cases of treason reserved to the General Assembly. These major instances, and others of a minor nature which might be mentioned, illustrate and demonstrate the mixture of powers which is not only tolerated, but expressly author-[fol. 52] ized. It was the purpose of the founders of our federal and state Constitutions to so balance the division of powers that each department would possess the constitutional means of resisting encroachments of the others, and, at the same time, to so divide and arrange the offices that each might be a check on the others.

In the instant case it is not complained that one department is attempting an invasion of the prerogative of another, but that the Legislature is voluntarily surrendering a part of its prerogative to the judiciary, and conferring both legislative and executive powers upon the judicial branch. It cannot be doubted that the Legislature may define the jurisdiction of the probate court; nor is it claimed that it may not. This is placed beyond argument by the clear language of Section 8 of Article IV of the Constitution. It is claimed, however, that the probate court is clothed with authority to determine the extent of the territory to be created into a park district and that this is a purely political question. Sections 2976-2 to 2976-5, inclusive, define the powers and procedure of the court. Application must be made, notice given, and a hearing had. Section 2976-4 provides:

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be con-

ducive to the general welfare, he shall enter an order creating the district under the name specified in the application."

[fol. 53] It is manifest, therefore, that the function of the court is in every sense judicial. It involves fact finding, and application of statutory principles and policies to the facts found. It is true that the policy of establishing parks and conserving natural resources is a purely political and therefore a legislative matter, but the question of existence of natural resources in any proposed district, and the further question of reasonable relation of proposed parks and natural resources to the general welfare, are justiciable matters.

It is further asserted that Section 2976-5, conferring upon the probate court power to appoint the commissioners, is unconstitutional because it confers an executive function upon the court. We have already seen that the Constitution places no barrier between the departments and there is no definite limitation of the general legislative authority which forbids giving to courts the power of appointment. On the other hand, there is very definite delegation of express power in that behalf. Section 27 of Article II provides:

"The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law. * * *."

The office of park commissioner is, of course, not provided for by the Constitution, and therefore becomes subject to legislative action. The Legislature has acted pursuant to this authority many times. The appointing power has been conferred upon the court of common pleas in the following instances: Sections 5868 and 5869, to ap-[fol. 54] point and license auctioneers and to determine the amount of the license, not in excess of $500; Section 2976-11, to appoint county library trustees; Section 2710, to appoint examiners of the county treasury; Section 5947, to license ferries; Section 2333, to appoint county building commissions; Section 15098, as amended 109 Ohio Laws, 354, to appoint trustees of the Cincinnati Southern Railway; by the Conservancy Act (104 Ohio Laws, 13; Section 6828-8, General Code), to appoint directors of conservancy districts.

The power of appointment has been conferred upon the probate courts in the following instances: Section 2971, to

appoint a board of county visitors; Section 2397, to appoint, in conjunction with the county auditor and county recorder, a county commissioner; Section 2579, to examine as to grounds of removal of the county auditor; Section 2714, in conjunction with county treasurer and county auditor, to determine the necessity for a night watchman for the treasury and to fix his compensation; Section 1662, to appoint probation officers; Section 2348, to participate in the approval of plans for a courthouse or jail; Section 1713, to add one or more justices of the peace to any township.

If this court should hold at this time that the probate court does not have power to make appointments, and that the Legislature has no authority to confer such power upon the probate court, we would by the same token hold all of these statutes to be unconstitutional and void. We have no difficulty in declaring that, by virtue of Section 27 of Article II of the Constitution, the Legislature has authority to confer the appointing power upon courts, the jurisdic-[fol. 55] tion of which is under the authority and control of the Legislature, and this, of course, includes probate and common pleas courts.

The second challenge we shall notice is directed to the power conferred upon the board of park commissioners to levy taxes upon the taxable property within the district, not exceeding one-tenth of a mill in any one year. It is claimed that this is an attempted delegation of legislative power, vested exclusively, by Section 1 of Article II of the Constitution, in the General Assembly. It is a maxim in constitutional law that power conferred by a Constitution upon a Legislature to make laws cannot be delegated by such body to any other body or authority, unless the authority to so delegate is given by the Constitution itself, either expressly or by implication. The legislative prerogative is one which involves judgment, wisdom, and discretion of a high order, and the trust thus imposed cannot be shifted to other shoulders; neither can the judgment and discretion of any other body be substituted for that of the Legislature itself.

This principle is well settled and is no longer the subject of controversy. Its application is one of the greatest difficulty in certain classes of cases, more especially in legislation involving the exercise of the police power.

In the complexity of our advancing civilization, in the wide differences in conditions in different localities in the same state, and in the ever-changing conditions in a given locality, the Legislature has found it necessary to content itself with declaring the principles governing a general public purpose, and to confer upon existing local officials, [fol. 56] or upon local boards to be created in a designated manner, the authority to provide, within definite limitations, rules and regulations to execute the general purpose expressed in the law itself. It does not argue against the completeness of the law that a given locality or district may or may not at its option avail itself of the provisions of the law. Statutes are sometimes peremptory and mandatory, and sometimes optional and permissive. One locality may have no need of governmental activity along a given line, while another locality in the same state may have an urgent need. That need must be ascertained and declared by means and methods prescribed by the law itself, which must be scrupulously followed. While the Legislature may not delegate to any other power the right to declare principles and standards, or general public policy, it may delegate to other competent agencies the power to determine whether or not they will avail themselves of the privileges conferred, and also delegate to certain named executive or administrative agencies authority involving discretion in relation to the execution of the law.

The Legislature having declared the governmental policy, and having fixed the legal principles which are to govern, an administrative agency may be given power to ascertain the facts and conditions to which the policies and principles apply.

The creation of boards and commissions has become a familiar means in recent periods to perform the executive functions which are essential to the administration of laws. Parks and reservoirs for conservation of natural resources are for the public welfare, and the general policy of creating [fol. 57] them, and the methods of doing so, are subject-matters of legislation. It is axiomatic that they cannot be created or maintained without the expenditure of money. Not being in that class or character of public improvement where assessments can be made upon property in the vicinity by reason of special benefits, that method of providing funds is not available. Manifestly a levy of taxes

upon all the property in the state cannot be made to create and maintain a district park. It is inevitable, therefore, that a district levy must be made, and the Legislature has in fact authorized district park boards to impose a levy not in excess of one-tenth of one mill upon the assessed value of all taxable property in the district, subject to the maximum levy for all purposes provided by law.

Applying the principles already declared, the Legislature has determined the general policy and defined the methods by which local needs can be determined by orderly processes. As a part of such methods and processes it has conferred upon the district board the power to determine the financial needs of the district and to make levies of taxes to meet them. We are concerned with the constitutionality of the power thus delegated.

The power of the state to levy and collect taxes for public purposes is indispensable to orderly government, and is inherent in sovereignty. No government could discharge its functions without funds, and funds can only be raised by the imposition of taxes. The exercise of the power of imposing and collecting taxes is legislative, and yet this power is not expressly conferred by our Constitution upon [fol. 58] the General Assembly. It is, however, necessarily included in the legislative authority conferred upon the General Assembly by Section 1 of Article II of the Constitution. Except for other express and implied provisions in the Constitution, the power of taxation would be vested in the Legislature alone, and without interference on the part of other governmental agencies. When these express and implied powers have been ascertained, the problems of the instant case will have been solved. The following provisions of the Constitution are pertinent to the inquiry:

Article VI, Section 2: "The General Assembly shall make such provisions by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."

Article X, Section 7: "The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law."

Article XII, Section 5: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall

state, distinctly, the object of the same, to which only, it shall be applied."

Article XIII, Section 6: "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Cities and villages in Ohio have in fact been organized under general laws, and the Legislature has in fact enacted statutes relative to the levy and collection of taxes by muni- [fol. 59] cipal corporations, which provisions are found in Sections 5625-3 and 3785, General Code. In harmony with the provisions of Section 6 of Article XIII of the Constitution, the provisions of the statute are in the nature of restrictions, thereby carrying out the constitutional mandate. By the provisions of Section 2 of Article VI of the Constitution the General Assembly was required to establish a thorough and efficient system of common schools throughout the state, and again there was the necessary implication that those local agencies in charge of the schools should have the power to impose and collect taxes. Counties and townships had been established as political subdivisions long before the adoption of the Constitution of 1851, and the same political necessity required the adoption of Section 7 of Article X, giving power of local taxation for police purposes to such subdivisions, but nevertheless requiring that such power should be only such "as may be prescribed by law."

All of these governmental agencies being local in their nature, it would have been impracticable, not to say impossible, for the General Assembly to have determined the amounts necessary to be provided by taxation; but, aside from that fact, the general policy of local control of local institutions has been a settled one in the genius of American government from its very foundation. The power of taxation is therefore a sovereign power and a legislative power, but the exercise of that power calls for certain administrative functions as indispensable to a wise and economical administration of public affairs. It is therefore the province of the General Assembly to determine the general governmental policy and the maximum of the

[fol. 60] extent of the imposition and collection of taxes for all purposes in the state; but it is the province of the local subdivisions to determine their local needs, and to distribute the parts composing that maximum among the several institutions to be created and maintained. All of these principles have been well settled, and, while numerous authorities might be cited in their support, it is only necessary to refer to a few leading cases: *Hill* v. *Higdon*, 5 Ohio St., 243, 250, 67 Am. Dec. 289; *Western Union Tel. Co.* v. *Mayer, Treas.*, 28 Ohio St., 521, 533; *City of Cincinnati* v. *Roettinger*, 105 Ohio St., 145, 154, 137 N. E., 6.

If park districts fell clearly within the political subdivisions referred to in the Constitution, the foregoing principles would be decisive of this controversy. It is claimed, however, by relators, that several differences distinguish them. It is claimed that, by reason of the fact that in all those political subdivisions particularly referred to in the Constitution public officers are elected by vote of the people, it necessarily follows that taxes can only be levied by local authorities where the local officials are elected by the vote of the people. We are not, however, able to find any provision in the Constitution which limits the power to levy taxes to elected officials, as distinguished from those who are appointed to office. We are unable to find that the Constitution makes any distinction between officers elected and officers appointed, so far as the powers to be conferred upon them are concerned. The Constitution does provide, in Sections 2 and 4 of Article X, that all township and county officers must be elected, but Section 27 of Article II provides that all officers not provided for by the Constitu-[fol. 61] tion may be either elected or appointed, as the Legislature may direct. Taxes could only be imposed and collected for the use of townships and counties by officers who are elected by the people, for the simple reason that townships and counties can only choose their officials by election. It does not follow that, if any other political subdivisions are created in a lawful way, the officers who would govern such political subdivisions might not hold their offices by appointment, under the provisions of Section 27 of Article II. Neither does it follow that such officers could not be charged with the duty and responsibility of levying the taxes necessary to carry on the functions of such subdivisions.

To reach this conclusion it is not necessary to resort to implication. In the same section which makes provision for the power of local taxation for townships and counties, we find that that power has been conferred upon "similar boards;" that is to say, boards which are similar as governmental agencies to trustees of townships and commissioners of counties. They would necessarily not be boards which would have their territorial jurisdiction identical with a township or a county, because this would necessarily constitute them either township or county officers. In such event, it would have been necessary that they be elected by a vote of the people, and there would be no problem to be solved. The Constitution framers must have had some particular agency in mind, and we can conceive of no agencies which would have been pertinent to the language used except boards which would have jurisdiction over some territorial district not identical with a township or a county. [fol. 62] Adopting this view of the matter, we are not without abundant authority to support the conclusions we have reached.

Park boards are strictly creatures of legislation. But this fact does not distinguish them from townships and counties, which are likewise creatures of legislation. It was clearly and emphatically so stated by Judge Ranney in Cincinnati, W. & Z. Rd. Co. v. Commrs. of Clinton County, 1 Ohio St., 77, at page 89 of the opinion:

"But what is a county? It is not imperium in imperio, in any sense. It is invested, as such, with no single attribute of sovereignty; and for reasons already stated, it cannot be. Rightly considered, it is a mere instrumentality, a means in the hands of the legislative power to accomplish its lawful purposes; and to this extent, a creature in the hands of its creator, subject to be molded and fashioned as the ever varying exigencies of the state may require."

Much more appears in that opinion of the same tenor. This language, coming as it does from Judge Ranney, who was the leading figure in the constitutional convention of 1851, becomes authority of unusual force. In the same opinion he quotes with approval from Rice v. Foster, 4 Har. (Del.), 479, 495, as follows:

"Legislative power is the power of making laws. The making of a law, prescribing by what persons, or by what

body, when, and in what manner taxes should be laid and collected, is the exercise of a legislative power. But the making of a resolution, or order, or the determination or direction by the persons or body appointed for such purpose [fol. 63] by the law, that taxes shall be laid and collected, is simply the execution of an authority granted by statute."

In the same opinion he quotes with approval from Parker v. Commonwealth, 6 Pa., 507, 47 Am. Dec., 480:

"A law designating the persons, or bodies of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law maker, for it is a rule of action prescribed. But the act of the designated persons or bodies, depends, for its authority, altogether upon the law commanding or permitting it."

Surely the Legislature has the same power to create districts as it has to create townships and counties. Judge Ranney's definition of a county has no point of difference as an instrumentality of government from the districts created by the acts now under consideration. We could not uphold the contentions of the relators in these cases without doing violence to the principle declared by this court in Miami County v. City of Dayton, 92 Ohio St., 215, 110 N. E., 726.

It is true that the Conservancy Act has many essential differences from the Park District Act, and it is true that under the Conservancy Act provision is made for assessments upon lands in the vicinity to defray the cost of the improvement, and it is true that in that case the court treated all levies of taxes as special assessments. The Conservancy Act does make provision for special assessments and it seems to us that it has also clearly made provision for levy of general taxes without regard to special benefits. [fol. 64] Section 43 of the act (Section 6828-43, General Code), contains the following povision:

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation

thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise."

The "assessed valuation thereof" must necessarily refer to the value of property assessed for purposes of general taxation, and cannot possibly refer to the "appraisal of benefits" referred to in other portions of the act. We agree with the conclusions reached by the court in that case, but in order to do so do not find it necessary to make any distinction between the power to levy general taxes and the power to levy special assessments. The Miami conservancy case was before this court a number of times, and every feature of the Conservancy Act was brought in question in those various proceedings, and all were found to be valid and constitutional. The same principle must necessarily apply to the Park Board Act, and those principles which have become a rule of property in conservancy cases cannot upon any equitable principle be denied application to cases arising under the Park Board Act.

In State, ex rel. Village of Cuyahoga Heights, v. Zangerle, 103 Ohio St., 566, 134 N. E., 686, this court had under [fol. 65] consideration the Health District Law, 108 Ohio Laws, pt. 2, 1085 (Section 1261-16 et seq., General Code). That law provided for local health districts and general health districts. The general health district was not identical in territory with any other political subdivison of the state. The law did definitely provide for a levy of taxes to carry on the health activities of the district, but it did provide in Section 1261-40 that the board of health of a general health district should estimate the amounts needed for the current expenses of the district and submit the same to the budget commissioners, and further provided: "The aggregate amount as fixed by the budget commissioners shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of taxable valutions in such townships and municipalities." The section further provided that the required amount should be withheld by the several auditors of the counties of the district, and the results were therefore the same as though the tax had been directly levied by the

board, the auditor having no alternative except to withhold the amount requested and place the same in the "district health fund."

In State, ex rel. Fritz, v. Gongwer, 114 Ohio St., 642, 151 N. E., 752, this court had under consideration the District Ditch Law. (Sections 6536 to 6542, inclusive, General Code.) That law did not permit of a levy of general taxes, but made provision for special assessments. The assessments were made by elective officers, viz., the commissioners of the counties, the whole or parts of which composed the taxing district. It was held in that case that the law was [fol. 66] constitutional, and it was particularly stated that the county commissioners, while acting under that law, were not acting as county commissioners, but as officers of the entire territory composing the taxing district. While no provision was made in that law for a direct levy of general taxes, it did permit the pledging of the faith and credit of the special taxing district as security for bonds to be issued, and it necessarily follows that, if there were at any time default in any bond issued by any such district, and a liability thereon which could not be met by the special assessments, the residue would have to be met by a general levy of taxes on all of the property within the district. That decision is therefore authority for the doctrine that a levy of general taxes may be made by district officers who hold their offices ex officio, and therefore by appointment.

Counsel for relators interpret the Miami and Gongwer cases as giving to appointive officers only the power to levy special assessments. Even if we should adopt that limited interpretation of those cases, they would still be authority for the proposition that appointive officers might be empowered to levy general taxes, because we find nothing in the Constitution which places special assessments upon a different basis from general taxes. The Constitution provided that certain officials must be elected by vote of the people, and then provides that other officers than those named may be either elected or appointed. It does not follow that the duties and responsibilities of the one are less important than those of the other. The case of Cline v. Martin, 94 Ohio St., 420, 115 N. E., 37, has many points in common with the instant controversy. That case was [fols. 67 & 68] heard at a time when the members of the county school board were appointive. At that time the

provisions for obtaining funds to carry on the work of the county board were much the same as the provisions of the general district health law, which has already been adverted to.

State, ex rel. Atty. Gen., v. Covington, 29 Ohio St., 102; State v. Baugham, 38 Ohio St., 455, and State ex rel. Herron v. Smith, 44 Ohio St., 348, 7 N. E. 447, 12 N. E., 829, each and all present analogies to the instant case, as showing the exercise of the functions of levying taxes by persons and boards holding office by appointment and the approval of such exercise by this court. It is true that in all of those cases counsel did not argue the points which have been so strongly presented in the instant case, but upon thorough inquiry into the subject we are of the opinion that the Constitution has fully authorized the Legislature to create districts, as separate political subdivisions, and to create boards to exercise the governmental activities of the district, and to utilize such boards as fact-finding agencies, and to determine the financial needs of such districts, and to impose and collect taxes to defray the same.

A minority of the members of this court finds no conflict in the District Park Board Act with any of the provisions of the Constitution. The act was held to be valid and constitutional by the Court of Appeals, and a minority of this court is therefore under the necessity of affirming that judgment, since the Constitution requires the concurrence of all but one of the judges of this court to hold it to be unconstitutional. The judgment in each case is affirmed.

Judgments affirmed.

Kinkade J., concurs.

[fol. 69] [File endorsement omitted.]

[fol. 70] IN SUPREME COURT OF OHIO

[Titled omitted.]

MOTION TO VACATE JUDGMENT AND FOR JUDGMENT FOR PLAINTIFF IN ERROR—Filed May 25, 1929

Now comes E. H. Bryant, a taxpayer of Summit County, Ohio, plaintiff in error, and respectfully moves the court to enter an order vacating and holding for naught the

judgment heretofore entered upon the journal of this court affirming the judgment of the Court of Appeals of Summit County in this cause, and to enter in lieu thereof a judgment of this court in this cause, reversing the judgment of the Court of Appeals of Summit County, Ohio, rendered herein and remanding this cause to the Common Pleas Court of Summit County for further proceedings according to law, or enter an order vacating and holding for naught the judgment of this court heretofore rendered on the journal of this court affirming the judgment of the Court of Appeals of Summit County in this cause, and entering a judgment in this cause in favor of the plaintiff in error in accordance with and as prayed for in his amended petition. [fol. 71] And for the grounds upon which this motion is based the plaintiff in error represents to the court that he began this action as a taxpayer in the Common Pleas Court of Summit County against the defendants in error, seeking equitable relief, and otherwise, in a petition predicated on the grounds that Sec. 2976-1 et seq. G. C., as being in violation of the Constitution of Ohio, the Constitution of the United States, and that certain sections of said Park District Act violate certain provisions of the said Constitutions, and all of which are specifically pointed out in his amended petition; that defendants in error filed an answer to plaintiff's amended petition constituting an admission of facts requiring no evidence; that said cause was heard by the Common Pleas Court which thereafter entered an order dismissing plaintiff's amended petition and entering judgment in favor of the defendants in error.

That thereupon plaintiff in error prosecuted error proceedings to the Court of Appeals of Summit County, which court entered a judgment affirming the judgment of the Common Pleas Court.

Whereupon, plaintiff in error filed a petition of right in this court, and, after the submission of briefs and two arguments, this court on March 27, 1929, affirmed the judgment of the Court of Appeals of Summit County holding the Park District Act constitutional. This was accomplished by the concurrence of two members of this court holding that the Park District Act is constitutional, while five members of this court refused to concur with the two members so holding, hold that the Park District Act is unconstitutional.

Plaintiff in error states that this court, like the lower court, failed to pass upon the constitutionality of Secs. 2926-10 and 2926-10h, G. C., or determine whether said [fol. 72] Park District Act violates the Federal Constitution of any of its provisions, and fails to state on its journal entry that no Federal question is presented, deciding or involved in this controversy. This action of the court in affirming the judgment of the Court of Appeals in this cause upon the vote of but two of its members, and notwithstanding that five of its members constitute a majority of the entire court, found the Park District Act was unconstitutional, is predicated upon that part of Section 2 of Article 4 of the Constitution which is as follows:

"No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void."

The plaintiff in error believes and respectfully prays the court to grant this motion for the reversal of the judgment of the Court of Appeals in this cause for the following reasons:

(1) The provision above set forth and contained in Section 2 of Article 4 of the Constitution of Ohio is inconsistent and in direct and irreconcilable conflict with that portion of the same section, i. e., Section 2 of Article 4 of the Constitution of Ohio, which provides:

"It (the Supreme Court) shall have original jurisdiction in quo warranty, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state * * *;"

that the language last quoted is paramount and controlling over the language first quoted herein, rendering the provision first quoted invalid and unenforceable.

(2) The portion of Section 2 of Article 4, providing as follows:

"No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all *all*

[fols. 73 & 74] but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

is invalid and in conflict with the Constitution of the United States and the following language used therein in Article 1, Section 14, known as the Fourteenth Amendment, as follows:

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws;"

the provision in the Ohio Constitution contained, just hereinbefore set forth, does deny to citizens of Ohio due process of law, and does likewise deny to them the equal protection of the laws.

(3) The provision in the Constitution of Ohio contained, just hereinbefore set forth, is void and invalid as being repugnant to the letter and spirit of the Constitution of the State of Ohio, and likewise the Constitution of the United States in so far as they require and provide for each State having a republican form of government wherein the will of the majority shall prevail.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave. By Frederick A. Henry, Attorney for Plaintiff in Error.

[fol. 75] In Supreme Court of the United States

Statement of Points to be Relied on by Appellant and Designation of Parts of Record to be Printed—Filed July 26, 1929

The appellant, State of Ohio, ex rel. E. H. Bryant, files the following statement of points to be relied upon:

Point One

The Park District Act (General Code of Ohio, Sections 2976-4 et seq.) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the

Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that "No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void"; and on motion to vacate this judgment and substitute a judgment of reversal pursuant to the opinion of the majority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be "the supreme law of the land" and that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding," the Supreme Court of Ohio erred in refusing so to do.

[fol. 76] Point Two

This peculiarity in the judicial structure of the Supreme Court of Ohio as illustrated in Board of Education v. Columbus, 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts,—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things,—but soley from the lottery of discordant, inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies the litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV

of the same instrument which assures to each state a republican form of government. Truax v. Corrigan, 257 U. S. 312; People v. Western Union Telegraph Co., 70 Colo. 90; White v. Hart, 13 Wall. 646; Gunn v. Berry, 15 Wall. 610.

Point Three

On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Section 4 of Article IV in delegating to non elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes. [fols. 77 & 78] Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 294; Parks v. Board of Commissioners of Wyandotte County, 61 Fed. 436.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave. By Frederick A. Henry, Attorney and of Counsel for Appellant.

[fol. 79] Designation of Parts of Record to be Printed

The appellant hereby designates the parts of the record herein to be printed under the supervision of the Clerk of this court, namely:

1. Amended petition filed in Common Pleas Court of Summit County, February 17, 1927.
2. Answer filed January 25, 1927; refiled March 2, 1927.
3. Transcript of docket and journal entries in the Court of Common Pleas of Summit County, Ohio.
4. Petition in error filed in the Court of Appeals of Summit County, October 14, 1927.
5. Transcript of docket and journal entries in the Court of Appeals of Summit County.

6. Petition in error filed in the Supreme Court of Ohio, August 2, 1928.
7. Opinion of Chief Justice Marshall of the Supreme Court of Ohio accompanying its decision of March 27, 1929.
8. Motion to vacate judgment and for judgment for plaintiff in error, etc., (not including brief supporting motion).
9. Transcript of docket and journal entries of the Supreme Court of Ohio.
10. Petition for appeal and allowance thereof.
11. Assignment of errors and allowance thereof.
12. Citation and proof of service thereof on appellees.

[fols. 80 & 81] The following parts of the record may be omitted from the printing:

Bond and approval thereof.

Precipe to the Clerk of the Supreme Court of Ohio for transcript to be certified to the Supreme Court of the United States, together with proof or acknowledgment of service of a copy on the appellees, etc.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave. By Frederick A. Henry, Attorneys and of Counsel for Appellant.

[fol. 82] [File endorsement omitted.]

Endorsed on cover: File No. 34,368. Ohio Supreme Court. Term No. 237, State of Ohio ex rel. E. H. Bryant, Appellant, vs. Akron Metropolitan Park District for Summit County, F. A. Seiberling, et al. Filed July 12, 1929. File No. 34,368.

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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 238

STATE OF OHIO EX REL. PAULINE WADSWORTH, APPELLANT,

vs.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY; THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT IN CLEVELAND, HARRY M. FARNSWORTH, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 12, 1929

(34,369)

(34,369)

SUPREME COURT OF THE UNITED STATES

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No. 238

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

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[fols. 1 & 2] **IN SUPREME COURT OF OHIO**

No. 21336

STATE OF OHIO ex Rel. PAULINE WADSWORTH, Taxpayer, Bay Village, Ohio, Appellant,

v.

JOHN A. ZANGERLE, Auditor of Cuyahoga County; THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT IN CLEVELAND, HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS E. MOSES, WM. A. STINCHCOMB, and THE UNION TRUST COMPANY, a Corporation, Appellees

PETITION FOR APPEAL—Filed June 13, 1929

To the Honorable Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio:

The petition of State of Ohio ex rel. Pauline Wadsworth, respectfully shows: That heretofore, towit, upon the 27th day of March, 1929, and upon the 5th day of June, 1929, there was rendered by this Court in the error proceedings entitled and bearing the docket number as above, a judgment affirming the judgments of the lower courts in a taxpayer's suit commenced in the Court of Common Pleas of Cuyahoga County, by the State of Ohio, ex rel. Pauline Wadsworth, against John A. Zangerle, Auditor of Cuyahoga County, The Board of Park Commissioners of The Metropolitan Park District in Cleveland, Harry M. Farnsworth, Warren S. Hayden, Louis E. Moses, Wm. A. Stinchcomb, and The Union Trust Company, for injunction against the levying of taxes and the completing of contracts by said Park District Commissioners, in which proceeding and in the error proceedings for the review thereof in the Court of Appeals for Cuyahoga County, and in this court, there was drawn in question the validity of the "Park District Act" of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive, (107 Ohio Laws, pages 65 to 69), and [fol. 3] the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental sections, 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097 to 1100), on the ground of

their being repugnant to the provisions of Article XIV, Section 1, of the amendments to, and of Article IV, Sections 2 and 4, of the Constitution of the United States in respect to the breach of the privileges and immunities and other rights of citizens, and of the guaranteed form of State government, by the vesting of the taxing and other legislative powers of the State of Ohio in nonelective officials of that State; and there was further drawn in question the validity of Section 2 of Article IV of the Constitution of Ohio on the ground of its being repugnant to the provisions of Article XIV, Section 1 of the amendments to the Constitution of the United States in regard to the denial of the equal protection of the laws by the Ohio Supreme Court's rendering of minority judgments on constitutional questions, and the decision in each of said matters was in favor of the validity of said statutory and constitutional provisions of the State of Ohio,—there being manifest error in the premises greatly to the damage of this appellant in refusing such injunction.

Appellant further shows that the said judgment of the Supreme Court of Ohio was and is a final judgment of the highest court of the State of Ohio in which a decision in said suit could or can be had; that a federal question was made in said case, towit, as hereinbefore set out; and that said judgment of said Supreme Court of Ohio was and is repugnant to, and in conflict with, the Constitution of the United States to which the said judgment of the Supreme Court of Ohio was contrary, albeit a decision of the said federal question was necessary to the judgment rendered; all of which more fully appears in the Assignment of Errors filed herewith.

Wherefore said appellant presents herewith an exemplified transcript of the record of the Supreme Court of Ohio in said case and prays that an appeal from said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved as security for costs.

State of Ohio ex rel. Pauline Wadsworth, by Frederick A. Henry, for George D. Hile, and Snyder, Henry, Thomsen, Ford & Seagrave, Williamson Bldg., Cleveland, Ohio, Attorneys for Appellant.

[fol. 4] The appeal as prayed for in the foregoing petition is hereby allowed and the bond for security for costs tendered therewith is hereby approved.

Dated at Columbus, Ohio, this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 13, 1929

The appellant in the above entitled suit having prayed for the allowance of an appeal in this case to the Supreme Court of the United States from the judgement and order or orders made and entered in the above entitled suit by the Supreme Court of the State of Ohio on the 27th day of March, 1929, and on the 5th day of June, 1929, and from each and every part thereof, and having present on file their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statute and to the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this case and transmit the same to the Supreme Court of the United [fol. 7] States, and he shall have the same in said Court within thirty days from this date.

And it is further ordered that the surety for costs on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

Dated this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 8] [File endorsement omitted.]

[fol. 9] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 13, 1929

The appellant, State of Ohio, ex rel. Pauline Wadsworth, files this assignment of errors to be reviewed by the Supreme Court of the United States on appeal from the Supreme Court of Ohio; said Supreme Court of Ohio having erred in the above entitled case in finding and deciding as follows:

1. That, "it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, C. J. and Kinkade, J) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed."

2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except [fol. 10] in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void", does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to "deny to any person within its jurisdiction the equal protection of the laws".

3. That the "Park District Act" of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive (107 Ohio Laws, pages 65-69) and the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said

act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that neither said act nor any of said sections, by delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state.

Wherefore said appellant prays that the foregoing assignment of errors be allowed by this court, and that the judgment and order or orders of this court may, by reason thereof, be reversed by the Supreme Court of the United States.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

Allowed this 13th day of June, 1929.
Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 11] [File endorsement omitted.]

[fols. 12-17] Citation, in usual form, showing service on Cyrus Locher, filed June 25, 1929, omitted in printing.

[fol. 18] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET AND JOURNAL ENTRIES

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments Decreed, and Orders.

1928.

Aug. 17. Petition in Error (as of right) & Waiver of Summons filed.

1928

Aug. 31. Court of Appeals transcript, common pleas court transcript and original papers filed.
Printed record and proof of service filed.

Sept. 19. Plaintiff's printed briefs (same as #21324) filed.
21. Proof of service of plaintiff's briefs filed.

Nov. 30. Deft's printed briefs (same as 21324) filed 12/1/28 proof of service filed.

Dec. 11. Plaintiff's printed reply briefs (same as 21324) filed.
14. Proof of Service of plaintiff's reply briefs filed.
20. Printed briefs, Amicus Curiae by George C. Hansen, (same as 21324) filed and sent to Court. 12/26/28 P. S. Filed.

1929.

Feb. 22. Printed briefs of Henderson, Quail, McGrew, & Morgan, Amicus Curiae, filed (same as 21324) 2/26/29 P. S. Filed.

Mar. 27. On Reargument, Judgment Affirmed. Journal #31 P. 614.

Apr. 3. Mandate Issued.
3. Original Papers Sent To Clerk.
26. Application for rehearing filed and sent to Court. Denied, June 5, J. 31.

May 25. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error, briefs on motion, notice and proof of service filed.

June 5. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error—Overruled Journal 31 Page 683.

June 13. Petition for allowance of appeal to Supreme Court of United States Filed.
Order allowing appeal filed. Assignment of error filed.
Bond in Sum of $500.00 signed by Pauline Wadsworth as principal, and Royal Indemnity Co. as Surety, filed and approved.

June 25. Citation, waiver and acceptance of service and entry of appearance filed.
Precipe for transcript and acknowledgment filed.

[fols. 19-21] Transcript of Journal Entries

1929.

Mar. 27. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County and was argued by Counsel. On consideration whereof, it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional, and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed, and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended taxed at $—.

Ordered, That a special mandate be sent the Court of Appeals of Cuyahoga County, to carry this Judgment into Execution.

June 5. It is ordered by the Court that this Motion be and the same is hereby, overruled.

June 5. It is ordered by the Court that application for rehearing in the above cause be and the same hereby is, denied.

[fol. 22] [File endorsement omitted]

[fol. 23] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION TO VACATE JUDGMENT, AND FOR JUDGMENT FOR PLAINTIFF IN ERROR—Filed May 25, 1929

Pauline Wadsworth, a taxpayer, etc., plaintiff in error, respectfully moves the court to enter an order vacating and holding for naught the judgment heretofore entered upon the journal of this court, affirming the judgment of the Court of Appeals of Cuyahoga County in this cause, and to enter in lieu thereof a judgment reversing the aforesaid judgment of the Court of Appeals and remanding the cause to said court for further proceedings according to law; or to enter an order vacating and holding for naught the judgment heretofore entered on the journal of this court, affirming the judgment of said Court of Appeals, and to enter in lieu thereof a judgment of this court in favor of the plaintiff in error, in accordance with, and as prayed for in, her amended petition; or, failing either of said remedies, to modify the judgment of this court by certifying to the ex-
[fol. 24] istence of a Federal question or questions upon this record and to the court's action thereon.

Plaintiff in error further says that she began this action as a taxpayer in the Common Pleas Court of Cuyahoga County against the defendants in error, seeking injunction and other equitable relief and alleging, among other things, (a) that the Park District Act § 2976-1 et seq., G. C., is invalid as being in violation of the Constitution of Ohio, the Constitution of the United States, and that certain sections of said Park District Act violate certain provisions of said Constitutions that are specifically pointed out in her amended petition; (b) that defendants in error had contracted to purchase land for a large sum upon which there were no natural resources which could be conserved if purchased; (c) that the Auditor of Cuyahoga County did not furnish the certificate required by § 2976-10 G. C.; (d) that defendants in error had been and were expending public funds for purposes not authorized by the Park District Act or any section thereof; (e) that §§ 2976-10g and 2976-10h,

G. C., are unconstitutional and void. The defendants in error filed an answer to plaintiff in error's amended petition, to which were attached certain interrogatories for them to answer, one being,

"Tenth Q. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?"

which they answered as follows, towit:

"A. Its adaptability for general public recreational uses, by reason of its location, topography, and lake frontage."

[fol. 25] Said cause was heard by the Common Pleas Court of Cuyahoga County, which dismissed plaintiff in error's amended petition and rendered judgment for defendants in error; whereupon the plaintiff in error appealed this cause to the Court of Appeals of Cuyahoga County which made separate findings of fact and of law as requested; and inter alia found, first, that the Auditor of Cuyahoga County did not furnish a certificate that the funds were in the treasury to pay for the land which plaintiff in error asked that the defendants in error be enjoined from buying; second, that defendants are and were expending public funds (a) for building an artificial lake or dam, (b) for attorney fees, (c) for taxicab and trucking; and said Court of Appeals for its conclusions of law affirmed the judgment of the Common Pleas Court upholding said Park District Act. (R. 29-37.)

Thereupon, plaintiff in error filed a petition in error of right in this court, and, after the submission of briefs and two arguments, this court on March 27, 1929, affirmed said judgment. This was accomplished by the concurrence of two members of this court holding that the Park District Act is constitutional, with five judges non-concurring.

Plaintiff in error contends that this court, like the lower courts, failed to pass specifically upon the constitutionality of §§ 2976-10g and 2976-10h of the General Code, or to determine whether defendants in error were about to expend public funds contrary to the provisions of the act in question, or were acting in violation of the provisions of the Ohio and Federal Constitutions, or whether said Park Dis-

trict Act, or any of its provisions, violates the Federal Constitution or any of its provisions; and the court fails to state in its journal entry that no federal question is pre-[fol. 26] sented, decided or involved in this controversy.

This action of the court in affirming the judgment of the Court of Appeals in this cause upon the vote of but two of its members, notwithstanding that five of its members nonconcurring and constituting a majority of the entire court considered the Park District Act to be unconstitutional, is erroneously predicated upon the following provision of Section 2 of Article 4 of the Constitution of Ohio:

"No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void."

The opinion herein declares that this Court has given no consideration to G. C. §§ 2976-10g and 2976-10h, the record disclosing no attempt or purpose of the Cleveland Park Board to enact by-laws, etc., defining offenses or to prosecute violators thereof, or to empower agents to make arrests, but that the attention of the court has been confined to §§ 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-i, thus ignoring, among other provisions of the Act, § 2976-7 empowering such board "to acquire lands either within or without such district", and § 2976-10h requiring that before any contract or outlay can lawfully be made, the county auditor shall certify that there is unappropriated money in the treasury sufficient to cover the same. Hence arise the following—

Grounds for Rehearing

First. The amended petition in the Cleveland case alleges (R. 9, 15-16) that the Board has expended large sums of money without warrant of law in the development of its parks and will continue to expend public funds unlawfully and for the purposes, among others, of employing "engineers, draftsmen, care-keepers and useless supernumeraries", and to "pay keepers or persons put in charge there-[fol. 27] of", for which purposes its power is limited by G. C. § 2976-6 to the employment of "a secretary and such

other employees as may be necessary in the performance of the powers herein conferred", and is further defined by G. C. § 2976-10h which provides that "Such employees as the Board of Park Commissioners may designate for that purpose shall have and may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of said Board". The answer admits the acquiring of much real estate "for the purpose for which said Board is by law authorized to acquire lands". It is thus only by arbitrary construction that there can be predicated of this record a non-disclosure of the Cleveland Board's continuing expenditure of money and designation of employees to keep and care for its large areas of park lands in the way authorized by the Act, namely, by exercising the "powers of police officers". Furthermore, this court is long since committed to the proposition that a tendered issue of the unconstitutionality of a law is not moot but must be adjudicated, even though a concrete case of actual or intended transgression of the asserted constitutional limitation has not yet arisen in the administration of such law. State, ex rel. Pogue, v. Groom, 91 O. S. 1, 8; 12 C. J. 786, note 78.

Secondly. The amended petition alleges, and it is conceded, that the Cleveland Park Board has acquired lands, "about 400 acres being in Lake County", wholly outside the Park District, and "now has pending condemnation actions to acquire land therein" (R. 14), and has been and is "expending large sums of money, without warrant", for these and other purposes. Thus, the consideration of this court was clearly challenged, but was not accorded, to the asserted unlawfulness of taxing the inhabitants of the village and county of plaintiff's residence, within the district, for the acquiring of park lands elsewhere.

[fol. 28] Thirdly. The amended petition also alleges, and it is expressly found by the Court of Appeals (R. 9, 36-37), that a certain contract of the Cleveland Park Board with The Union Trust Company for the acquiring of a large tract of land in Cuyahoga County had been partly carried out and was being fully consummated without the County Auditor's certificate of funds available to pay the cost. This point was also improperly ignored. Besides these omissions to adjudicate issues tendered, this court has erred in its judgment—

Fourthly. The judgment here denies to plaintiff in error, in the construing of this Act and the disposing of this cause, the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, which the amended petition expressly invoked (R. 17) in respect to the unequal operation of the Act in subjecting (among its other inequalities) the taxpayers within the district to the financial burden of acquiring and maintaining lands outside of it, and the same constitutional guaranty is now further invaded by the rendering of judgment against this plaintiff in error by the concurrence of a minority—less than a quorum—of this Court upon said Federal question, and by the Court's failing to state in its journal entry that such Federal question was presented and was so adjudicated by such minority.

Fifthly. The entering by this Court of a minority judgment upholding the constitutionality of a law which the judgment of the Court of Appeals has sustained, when a contrary judgment by another Court of Appeals may at the same time be affirmed here by the same vote, is a peculiarity of the Ohio Constitution and of the judicial structure of this State, which necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution above [fols. 29-32] cited, and by Section 4 of Article 4 of the same instrument which assures to each state a republican form of government. Cf. Board of Education v. City of Columbus, 118 O. S. 295; The Federalist, No. 43. To these provisions of the Constitution of the United States as the supreme law of the land, this anomalous and inconsistent provision of the Ohio Constitution must yield and judgment herein be rendered by majority rule. This applies not only to the determining of the repugnance of the Act to the Ohio Constitution, but a fortiori to the testing of such act under the Constitution of the United States which may and must be adjudicated by the majority of this Court.

Wherefore plaintiff in error prays for a rehearing and for the relief hereinbefore specified.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys for Plaintiff in Error, State of Ohio ex Rel. Pauline Wadsworth.

[fol. 33] IN SUPREME COURT OF OHIO

(Nos. 21324 and 21336—Decided March 27, 1929)

THE STATE ex Rel. BRYANT v. AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY et al.

THE STATE ex Rel. WADSWORTH, a Taxpayer,

v.

ZANGERLE, AUD., et al.

Error to the Court of Appeals of Summit County. Error to the Court of Appeals of Cuyahoga County

Constitutional law—Park district act—Section 2976-1 et seq., General Code—Constitutionality affirmed by two Judges of Supreme Court—Legislative powers not delegated to administrative bodies—Political and executive powers not delegated to judicial officers—Appointive officers may levy taxes.

The facts are stated in the opinion.

Mr. Geo. D. Hile and Messrs. Snyder, Henry, Thomsen, Ford & Seagrave, for plaintiffs in error.

Messrs. Myers & Dinsmore and Mr. O. A. Hunsicker, for defendants in error in No. 21324.

Mr. Edward C. Stanton, prosecuting attorney, Mr. E. J. Thobaben and Messrs. Locher, Green & Woods, for defendants in error in No. 21336.

[fol. 34] OPINION

MARSHALL, C. J.:

These two error proceedings, filed in this court as of right, involve the same or similar questions of constitutional law, and have therefore been argued together and will be disposed of in one opinion. Each was begun as a taxpayer's suit, attacking the constitutionality of the Park District Act, General Code Sections 2976-1 to 2976-10c, inclusive (107 O. L., 65-69), and the amendments thereto, Sections 2976-1 and 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 O. L., pt. 2, 1097-1100). Inci-

dentally, the litigation in each instance involves questions of the lawful existence of the two metropolitan park boards organized under and pursuant to said statutes, in Cleveland and Akron, respectively.

In cause No. 21324, here on error from the Court of Appeals of Summit county, that court had affirmed the judgment for the defendants pronounced in the court of common pleas upon the pleadings, which joined issue upon the constitutional objections alleged by the taxpayer against said statutes. In cause No. 21336, here on error from the Court of Appeals of Cuyahoga county, that court heard the case on appeal from the court of common pleas of that county and rendered judgment for the defendants, with separate findings of fact and conclusions of law. In each case, the prayer of the petition was that the officers of the district park boards be enjoined from incurring obligations requiring the expenditure of public funds, or from exercising any of the powers conferred upon them by said statutes, and, more especially, that they be enjoined from levying any taxes upon property within the respective park districts, on the ground that all such statutes were unconstitutional and void.

[fol. 35] Section 2976-1, as amended, provides for park districts for the conservation of the natural resources of the state, and further provides that such districts may include all, or a part only, of the territory within a county, if existing townships or municipalities are not divided.

Section 2976-2 provides that application may be made to the probate judge to create a park district, which application shall state the name of the district, contain accurate descriptions of the territory to be included, and be accompanied with an accurate map or plat.

Section 2976-3 provides for notice of the time of hearing such application.

Section 2976-4 provides for the hearing and taking evidence, as in other civil cases in said court and provides that, if the judge finds that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application.

Section 2976-5 provides that upon creation of such district the probate judge shall appoint three commissioners, who shall take oath and give bond, and who shall serve

without compensation, except the allowance of actual and necessary expenses.

Section 2976-6 provides that such board shall be a body politic and corporate and shall be capable of suing and being sued.

Section 2976-7 confers upon such board power to acquire "lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create [fol. 36] parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 2976-8 authorizes such park board to take control of any municipal park or park lands within the district by agreement with the authorities controlling the same.

Section 2976-9 provides: "In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in excess of fifty per cent of such total cost, upon abutting, contiguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable."

Section 2976-10 provides: "Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill [fol. 37] upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise

provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate, and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent. of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill."

Section 2976-10a provides for the disposition of records, surveys, and other property, including treasury balances required by laws superseded by these acts.

Section 2976-10b provides for the custody, accounting, depositing, and disbursement of park board funds, and requires the auditor's certificate of money in hand to provide [fol. 38] for contracts before becoming effective.

Section 2976-10c provides for removal of commissioners at the discretion of the probate judge, either upon complaint filed or upon his own motion, and for the appointment of successors.

Section 2976-10d provides for annexation to a park district of territory adjacent and contiguous thereto, whether located within or without the county wherein such district was created.

Section 2976-10e provides, in case of annexation to a park district of territory located in a county other than a county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by Section 2976-10, and the auditor and treasurer of the county in which such annexed territory is

located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon auditors and treasurers by Section 2976-10b.

Section 2976-10f provides that park boards may sell lands on approval by the probate judge.

Section 2976-10g gives to such boards power to adopt by-laws, rules, and regulations, and further provides that the violation of any such by-laws, rules, and regulations shall constitute a misdemeanor punishable by fines.

Section 2976-10h provides that such employes of the board as may be designated for that purpose shall have and exercise the powers of police officers within and adjacent to the lands under the jurisdiction and control of the board.

[fol. 39] Section 2976-10i provides: "Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition to the taxes authorized by Section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such

levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further [fol. 40] that the amount of bonds so issued and outstanding at any time shall not exceed one per cent of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the Industrial Commission of Ohio as provided by law."

While the petitions attack the constitutionality of Sections 2976-10g and 2976-10h, we shall give no consideration to those sections, because it does not appear that either of the boards involved in these error proceedings has ever attempted to enact by-laws, rules, and regulations, or to constitute any of their employees police officers, or to prosecute violators of said by-laws, rules, and regulations. The provisions particularly challenged and to which we shall direct our attention are Sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i.

There can be no question of the power of the General Assembly to establish park districts and boards of park commissioners, and to define their powers. No one would question the right of the General Assembly to levy a state tax to establish and maintain state parks and reserves, and to appoint commissioners to care for them. This right has freely been exercised in the past. These are institutions in which all the people of the state are presumably interested and by which they are benefited. Cities have freely exercised these rights, and the state has likewise, though rather sparingly, exercised them. District parks and boards of [fol. 41] park commissioners are institutions which differ from state institutions only in the range of the interest and benefit. By the legislation now under consideration provision has been made for park districts, whose benefits are more general than those of the cities and more local than those of the state. The power of the General Assembly to establish any of them is no longer doubted. This proceeding does not question the power of the Legislature to establish park districts. The attack is upon the methods by which they are established, and by which park boards

are created, and upon the powers conferred on them. The case of McNab v. Board of Park Comm'rs, of Metropolitan Park Dist. in Cleveland, 108 Ohio St., 497, 141 N. E., 332, held that the statutes under which the Cleveland Park Board was established were enacted under the broad legislative power conferred upon the General Assembly and in the exercise of the state's general police power, and the only consideration given in that case to Section 36 of Article II of the Constitution, (the amendment of 1912), was to declare that that amendment did not operate as a limitation upon general legislative power. The discussion of the state's police power in the opinion in that case need not be further elaborated here. While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made. This proceeding challenges the constitutionality of the various statutes because of alleged delegation of legislative powers to executive bodies, and alleged delegation of political and executive powers to judicial bodies. The first [fol. 42] challenge we shall notice is directed to the power conferred upon the probate judge to appoint park commissioners and to exercise the functions of molding the confines of the area affected and erecting the same into a park district. It is alleged that the appointing power is an executive function, and the establishment of the confines of the district a legislative function, and that both are nonjudicial.

The Constitution of Ohio has delegated to the General Assembly the legislative authority of this state. This authority is only subject to the express limitations found in the Constitution itself and the implied limitation that it must fall within the scope of legislative authority, as distinguished from judicial and executive authority conferred upon other departments. Except for the provisions relating to the initiative and referendum, all legislative authority of the state must be exercised by the General Assembly alone.

The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling

influence over the others. It was declared by Madison before the adoption of the United States Constitution: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To provide a practical security for each against the invasion [fol. 43] of the others was felt by the early founders of our government to be a most important, as well as a most difficult, task. The State Constitutions of many of the states, adopted immediately after the federal Constitution went into effect, declared in strong terms that the powers of government ought to be forever separate and distinct from each other, and yet not one of them faithfully observed its own solemn injunctions, but made provision for certain powers to be exercised by departments other than those to which they properly belonged. Other states, including Ohio, and the federal government, made no such declaration, and while the powers have in fact been assigned to the three departments, no barriers have been provided between them, and no injunction declared against invasions or surrenders.

Our own Constitution contains many instances of conferring powers upon departments foreign to their true classification. The Constitution of 1802 provided for judges to be chosen by the Legislature. Our present Constitution gives to the Governor the veto power. The Lieutenant Governor presides over the Senate. The House of Representatives has the sole power of impeachment, and impeachments must be tried by the Senate. The Governor may convene the General Assembly in extraordinary session and limit the deliberations of such session. In case of disagreement between the two houses, he may adjourn them. The executive prerogative of pardon is in cases of treason reserved to the General Assembly. These major instances, and others of a minor nature which might be mentioned, illustrate and demonstrate the mixture of powers which is not only tolerated, but expressly authorized. It was the purpose of the [fol. 44] founders of our federal and state Constitutions to so balance the division of powers that each department would possess the constitutional means of resisting encroachments of the others, and, at the same time, to so divide and arrange the offices that each might be a check on the others.

In the instant case it is not complained that one department is attempting an invasion of the prerogative of another, but that the Legislature is voluntarily surrendering a part of its prerogative to the judiciary, and conferring both legislative and executive powers upon the judicial branch. It cannot be doubted that the Legislature may define the jurisdiction of the probate court; nor is it claimed that it may not. This is placed beyond argument by the clear language of Section 8 of Article IV of the Constitution. It is claimed, however, that the probate court is clothed with authority to determine the extent of the territory to be created into a park district and that this is a purely political question. Sections 2976-2 to 2976-5, inclusive, define the powers and procedure of the court. Application must be made, notice given, and a hearing had. Section 2976-4 provides:

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application."

[fol. 45] It is manifest, therefore, that the function of the court is in every sense judicial. It involves fact finding, and application of statutory principles and policies to the facts found. It is true that the policy of establishing parks and conserving natural resources is a purely political and therefore a legislative matter, but the question of existence of natural resources in any proposed district, and the further question of reasonable relation of proposed parks and natural resources to the general welfare, are justiciable matters.

It is further asserted that Section 2976-5, conferring upon the probate court power to appoint the commissioners, is unconstitutional because it confers an executive function upon the court. We have already seen that the Constitution places no barrier between the departments and there is no definite limitation of the general legislative authority which forbids giving to courts the power of appointment. On the other hand, there is very definite dele-

gation of express power in that behalf. Section 27 of Article II provides:

"The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law. * * *."

The office of park commissioner is, of course, not provided for by the Constitution, and therefore becomes subject to legislative action. The Legislature has acted pursuant to this authority many times. The appointing power has been conferred upon the court of common pleas in the following instances: Sections 5868 and 5869, to appoint and [fol. 46] license auctioneers and to determine the amount of the license, not in excess of $500; Section 2976-11, to appoint county library trustees; Section 2710, to appoint examiners of the county treasury; Section 5947, to license ferries; Section 2333, to appoint county building commissions; Section 15098, as amended 109 Ohio Laws, 354, to appoint trustees of the Cincinnati Southern Railway; by the Conservancy Act (104 Ohio Laws, 13; Section 6828-8, General Code), to appoint directors of conservancy districts.

The power of appointment has been conferred upon the probate courts in the following instances: Section 2791, to appoint a board of county visitors; Section 2397, to appoint, in conjunction with the county auditor and county recorder, a county commissioner; Section 2578, to examine as to grounds of removal of the county auditor; Section 2714, in conjunction with county treasurer and county auditor, to determine the necessity for a night watchman for the treasury and to fix his compensation; Section 1662, to appoint probation officers; Section 2348, to participate in the approval of plans for a courthouse or jail; Section 1713, to add one or more justices of the peace to any township.

If this court should hold at this time that the probate court does not have power to make appointments, and that the Legislature has no authority to confer such power upon the probate court, we would by the same token hold all of these statutes to be unconstitutional and void. We have no difficulty in declaring that, by virtue of Section 27 of Article II of the Constitution, the Legislature has authority to confer the appointing power upon courts, the jurisdiction

[fol. 47] of which is under the authority and control of the Legislature, and this, of course, includes probate and common pleas courts.

The second challenge we shall notice is directed to the power conferred upon the board of park commissioners to levy taxes upon the taxable property within the district, not exceeding one-tenth of a mill in any one year. It is claimed that this is an attempted delegation of legislative power, vested exclusively, by Section 1 of Article II of the Constitution, in the General Assembly. . It is a maxim in constitutional law that power conferred by a Constitution upon a Legislature to make laws cannot be delegated by such body to any other body or authority, unless the authority to so delegate is given by the Constitution itself, either expressly or by implication. The legislative prerogative is one which involves judgment, wisdom, and discretion of a high order, and the trust thus imposed cannot be shifted to other shoulders; neither can the judgment and discretion of any other body be substituted for that of the Legislature itself.

This principle is well settled and is no longer the subject of controversy. Its application is one of the greatest difficulty in certain classes of cases, more especially in legislation involving the exercise of the police power.

In the complexity of our advancing civilization, in the wide differences in conditions in different localities in the same state, and in the ever-changing conditions in a given locality, the Legislature has found it necessary to content itself with declaring the principles governing a general public purpose, and to confer upon existing local officials, [fol. 48] or upon local boards to be created in a designated manner, the authority to provide, within definite limitations, rules and regulations to execute the general purpose expressed in the law itself. It does not argue against the completeness of the law that a given locality or district may or may not at its option avail itself of the provisions of the law. Statutes are sometimes peremptory and mandatory, and sometimes optional and permissive. One locality may have no need of governmental activity along a given line, while another locality in the same state may have an urgent need. That need must be ascertained and declared by means and methods prescribed by the law itself, which must be scrupulously followed. While the Legislature may

not delegate to any other power the right to declare principles and standards, or general public policy, it may delegate to other competent agencies the power to determine whether or not they will avail themselves of the privileges conferred, and also delegate to certain named executive or administrative agencies authority involving discretion in relation to the execution of the law.

The Legislature having declared the governmental policy, and having fixed the legal principles which are to govern, an adminstrative agency may be given power to ascertain the facts and conditions to which the policies and principles apply.

The creation of boards and commissions has become a familiar means in recent periods to perform the executive functions which are essential to the administration of laws. Parks and reservoirs for conservation of natural resources are for the public welfare, and the general policy of creat- [fol. 49] ing them and the methods of doing so, are subject-matters of legislation. It is axiomatic that they cannot be created or maintained without the expenditure of money. Not being in that class or character of public improvement where assessments can be made upon property in the vicinity by reason of special benefits, that method of providing funds is not available. Manifestly a levy of taxes upon all the property in the state cannot be made to create and maintain a district park. It is inevitable, therefore, that a district levy must be made, and the Legislature has in fact authorized district park boards to impose a levy not in excess of one-tenth of one mill upon the assessed value of all taxable property in the district, subject to the maximum levy for all purposes provided by law.

Applying the principles already declared, the Legislature has determined the general policy and defined the methods by which local needs can be determined by orderly processes. As a part of such methods and processes it has conferred upon the district board the power to determine the financial needs of the district and to make levies of taxes to meet them. We are concerned with the constitutionality of the power thus delegated.

The power of the state to levy and collect taxes for public purposes is indispensable to orderly government, and is inherent in sovereignty. No government could discharge its functions without funds, and funds can only be raised by

the imposition of taxes. The exercise of the power of imposing and collecting taxes is legislative, and yet this power is not expressly conferred by our Constitution upon [fol. 50] the General Assembly. It is, however, necessarily included in the legislative authority conferred upon the General Assembly by Section 1 of Article II of the Constitution. Except for other express and implied provisions in the Constitution, the power of taxation would be vested in the Legislature alone, and without interference on the part of other governmental agencies. When these express and implied powers have been ascertained, the problems of the instant case will have been solved. The following provisions of the Constitution are pertinent to the inquiry:

Article VI, Section 2: "The General Assembly shall make such provisions by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."

Article X, Section 7: "The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law."

Article XII, Section 5: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Article XIII, Section 6: "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Cities and villages in Ohio have in fact been organized under general laws, and the Legislature has in fact enacted statutes relative to the levy and collection of taxes by mu- [fol. 51] nicipal corporations, which provisions are found in Sections 5625-3 and 3785, General Code. In harmony with the provisions of Section 6 of Article XIII of the Constitution, the provisions of the statute are in the nature of restrictions, thereby carrying out the constitutional mandate. By the provisions of Section 2 of Article VI of the

Constitution the General Assembly was required to establish a thorough and efficient system of common schools throughout the state, and again there was the necessary implication that those local agencies in charge of the schools should have the power to impose and collect taxes. Counties and townships had been established as political subdivisions long before the adoption of the Constitution of 1851, and the same political necessity required the adoption of Section 7 of Article X, giving power of local taxation for police purposes to such subdivisions, but nevertheless requiring that such power should be only such "as may be prescribed by law."

All of these governmental agencies being local in their nature, it would have been impracticable, not to say impossible, for the General Assembly to have determined the amounts necessary to be provided by taxation; but, aside from that fact, the general policy of local control of local institutions has been a settled one in the genius of American government from its very foundation. The power of taxation is therefore a soverign power and a legislative power, but the exercise of that power calls for certain administrative functions as indispensable to a wise and economical administration of public affairs. It is therefore the province of the General Assembly to determine the general governmental policy and the maximum of the [fol. 52] extent of the imposition and collection of taxes for all purposes in the state; but it is the province of the local subdivisions to determine their local needs, and to distribute the parts composing that maximum among the several institutions to be created and maintained. All of these principles have been well settled, and, while numerous authorities might be cited in their support, it is only necessary to refer to a few leading cases: Hill v. Higdon, 5 Ohio St., 243, 250, 67 Am. Dec., 289; Western Union Tel. Co. v. Mayer, Treas., 28 Ohio St., 521, 533; City of Cincinnati v. Roettinger, 105 Ohio St., 145, 154, 137 N. E., 6.

If park districts fell clearly within the political subdivisions referred to in the Constitution, the foregoing principles would be decisive of this controversy. It is claimed, however, by relators, that several differences distinguish them. It is claimed that, by reason of the fact that in all those political subdivisions particularly referred to in the Constitution public officers are elected by vote of the peo-

ple, it necessarily follows that taxes can only be levied by local authorities where the local officials are elected by the vote of the people. We are not, however, able to find any provision in the Constitution which limits the power to levy taxes to elected officials, as distinguished from those who are appointed to office. We are unable to find that the Constitution makes any distinction between officers elected and officers appointed, so far as the powers to be conferred upon them are concerned. The Constitution does provide, in Sections 2 and 4 of Article X, that all township and county officers must be elected, but Section 27 of Article II provides that all officers not provided for by the Consti- [fol. 53] tution may be either elected or appointed, as the Legislature may direct. Taxes could only be imposed and collected for the use of townships and counties by officers who are elected by the people, for the simple reason that townships and counties can only choose their officials by election. It does not follow that, if any other political subdivisions are created in a lawful way, the officers who would govern such political subdivisions might not hold their offices by appointment, under the provisions of Section 27 of Article II. Neither does it follow that such officers could not be charged with the duty and responsibility of levying the taxes necessary to carry on the functions of such subdivisions.

To reach this conclusion it is not necessary to resort to implication. In the same section which makes provision for the power of local taxation for townships and counties, we find that that power has been conferred upon "similar boards;" that is to say, boards which are similar as governmental agencies to trustees of townships and commissioners of counties. They would necessarily not be boards which would have their territorial jurisdiction identical with a township or a county, because this would necessarily constitute them either township or county officers. In such event, it would have been necessary that they be elected by a vote of the people, and there would be no problem to be solved. The Constitution framers must have had some particular agency in mind, and we can conceive of no agencies which would have been pertinent to the language used except boards which would have jurisdiction over some territorial district not identical with a township or a county. [fol. 54] Adopting this view of the matter, we are not

without abundant authority to support the conclusions we have reached.

Park boards are strictly creatures of legislation. But this fact does not distinguish them from townships and counties, which are likewise creatures of legislation. It was clearly and emphatically so stated by Judge Ranney in Cincinnati, W. & Z. Rd. Co. v. Commrs. of Clinton County, 1 Ohio St., 77, at page 89 of the opinion:

"But what is a county? It is not imperium in imperio, in any sense. It is invested, as such, with no single attribute of sovereignty; and for reasons already stated, it cannot be. Rightly considered, it is a mere instrumentality, a means in the hands of the legislative power to accomplish its lawful purposes; and to this extent, a creature in the hands of its creator, subject to be molded and fashioned as the ever varying exigencies of the state may require."

Much more appears in that opinion of the same tenor. This language, coming as it does from Judge Ranney, who was the leading figure in the constitutional convention of 1851, becomes authority of unusual force. In the same opinion he quotes with approval from Rice v. Foster, 4 Har. (Del.), 479, 495, as follows:

"Legislative power is the power of making laws. The making of a law, prescribing by what persons, or by what body, when, and in what manner taxes should be laid and collected, is the exercise of a legislative power. But the making of a resolution, or order, or the determination or direction by the persons or body appointed for such pur- [fol. 55] pose by the law, that taxes shall be laid and collected, is simply the execution of an authority granted by statute."

In the same opinion he quotes with approval from Parker v. Commonwealth, 6 Pa., 507, 47 Am. Dec., 480:

"A law designating the persons, or bodies of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law maker, for it is a rule of action prescribed. But the act of the designated persons or bodies,

depends, for its authority, altogether upon the law commanding or permitting it."

Surely the Legislature has the same power to create districts as it has to create townships and counties. Judge Ranney's definition of a county has no point of difference as an instrumentality of government from the districts created by the acts now under consideration. We could not uphold the contentions of the relators in these cases without doing violence to the principle declared by this court in Miami County v. City of Dayton, 92 Ohio St., 215, 110 N. E., 726.

It is true that the Conservancy Act has many essential differences from the Park District Act, and it is true that under the Conservancy Act provision is made for assessments upon lands in the vicinity to defray the cost of the improvement, and it is true that in that case the court treated all levies of taxes as special assessments. The Conservancy Act does make provision for special assessments and it seems to us that it has also clearly made provision for levy of general taxes without regard to special [fol. 56] benefits. Section 43 of the act (Section 6828-43, General Code), contains the following provision:

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise."

The "assessed valuation thereof" must necessarily refer to the value of property assessed for purposes of general taxation, and cannot possibly refer to the "appraisal of benefits" referred to in other portions of the act. We agree with the conclusions reached by the court in that case, but in order to do so do not find it necessary to make any distinction between the power to levy general taxes and the power to levy special assessments. The Miami conservancy case was before this court a number of times,

and every feature of the Conservancy Act was brought in question in those various proceedings, and all were found to be valid and constitutional. The same principle must necessarily apply to the Park Board Act, and those principles which have become a rule of property in conservancy cases cannot upon any equitable principle be denied application to cases arising under the Park Board Act.

In State, ex rel. Village of Cuyahoga Heights, v. Zangerle, 103 Ohio St., 566, 134 N. E., 686, this court had [fol. 57] under consideration the Health District Law, 108 Ohio Laws, pt. 2, 1085 (Section 1261-16 et seq., General Code). That law provided for local health districts and general health districts. The general health district was not identical in territory with any other political subdivision of the state. The law did not definitely provide for a levy of taxes to carry on the health activities of the district, but it did provide in Section 1261-40 that the board of health of a general health district should estimate the amounts needed for the current expenses of the district and submit the same to the budget commissioners, and further provided: "The aggregate amount as fixed by the budget commissioners shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of taxable valuations in such townships and municipalities." The section further provided that the required amount should be withheld by the several auditors of the counties of the district, and the results were therefore the same as though the tax had been directly levied by the board, the auditor having no alternative except to withhold the amount requested and place the same in the "district health fund."

In State, ex rel. Fritz, v. Gongwer, 114 Ohio St., 642, 151 N. E., 752, this court had under consideration the District Ditch Law. (Sections 6536 to 6542, inclusive, General Code.) That law did not permit of a levy of general taxes, but made provision for special assessments. The assessments were made by elective officers, viz., the commissioners of the counties, the whole or parts of which composed the taxing district. It was held in that case that the law [fol. 58] was constitutional, and it was particularly stated that the county commissioners, while acting under that law, were not acting as county commissioners, but as offi-

cers of the entire territory composing the taxing district. While no provision was made in that law for a direct levy of general taxes, it did permit the pledging of the faith and credit of the special taxing district as security for bonds to be issued, and it necessarily follows that, if there were at any time default in any bond issued by any such district, and a liability thereon which could not be met by the special assessments, the residue would have to be met by a general levy of taxes on all of the property within the district. That decision is therefore authority for the doctrine that a levy of general taxes may be made by district officers who hold their offices ex officio, and therefore by appointment.

Counsel for relators interpret the Miami and Gongwer cases as giving to appointive officers only the power to levy special assessments. Even if we should adopt that limited interpretation of those cases, they would still be authority for the proposition that appointive officers might be empowered to levy general taxes, because we find nothing in the Constitution which places special assessments upon a different basis from general taxes. The Constitution provided that certain officials must be elected by vote of the people, and then provides that other officers than those named may be either elected or appointed. It does not follow that the duties and responsibilities of the one are less important than those of the other. The case of Cline v. Martin, 94 Ohio St., 420, 115 N. E., 37, has many points in common with the instant controversy. That case was [fols. 59-61] heard at a time when the members of the county school board were appointive. At that time the provisions for obtaining funds to carry on the work of the county board were much the same as the provisions of the general district health law, which has already been adverted to.

State, ex rel. Atty. Gen., v. Covington, 29 Ohio St., 102; State v. Baughman, 38 Ohio St., 455, and State, ex rel. Herron v. Smith, 44 Ohio St., 348, 7 N. E. 447, 12 N. E., 829, each and all present analogies to the instant case, as showing the exercise of the functions of levying taxes by persons and boards holding office by appointment and the approval of such exercise by this court. It is true that in all of those cases counsel did not argue the points which

have been so strongly presented in the instant case, but upon thorough inquiry into the subject we are of the opinion that the Constitution has fully authorized the Legislature to create districts, as separate political subdivisions, and to create boards to exercise the governmental activities of the district, and to utilize such boards as fact-finding agencies, and to determine the financial needs of such districts, and to impose and collect taxes to defray the same.

A minority of the members of this court finds no conflict in the District Park Board Act with any of the provisions of the Constitution. The act was held to be valid and constitutional by the Court of Appeals, and a minority of this court is therefore under the necessity of affirming that judgment, since the Constitution requires the concurrence of all but one of the judges of this court to hold it to be unconstitutional. The judgment in each case is affirmed.

Judgments affirmed.

Kinkade, J., concurs.

[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed August 17, 1928

The plaintiff in error, Pauline Wadsworth, suing as a taxpayer and freeholder of Bay Village, Cuyahoga County, Ohio, for her petition in error says that on the 12th day of July, 1928, the Court of Appeals of Cuyahoga County in an action and proceeding on appeal from the Court of Common Pleas of Cuyahoga County, Ohio, therein pending, wherein this plaintiff in error was plaintiff and these defendants in error were defendants, rendered a judgment in favor of said defendants and against said plaintiff and dismissed the plaintiff's amended petition at her costs.

A transcript of the docket and journal entries of the Court of Common Pleas and of the Court of Appeals in said action and proceeding is filed herewith together with the original papers and pleadings. There is error in said record and proceedings in this, to-wit:

[fol. 63] 1. That judgment should have been rendered in favor of this plaintiff in error.

2. That the court erroneously decided the constitutional questions involved adversely to this plaintiff in error.

3. That the court erred in its conclusions of law as applied to its findings of fact.

4. That the court erred in rendering judgment upon the facts found by it in favor of the defendants in error.

5. That the plaintiff in error has been denied the protection of the constitutional provisions set forth in her amended petition.

6. That the court erred in holding that the Defendant Board of Park Commissioners constitutes a body politic and corporate.

7. That the court erred in holding that the Defendant Board of Park Commissioners has the constitutional authority to levy taxes.

8. For other errors manifest on the face of the record.

The plaintiff in error, therefore, prays that said judgment may be reversed and that she be restored to all things she lost by reason thereof.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys for Plaintiff in Error.

[fol. 64] Waiver of Summons and Entry of Appearance

The defendants in error waive the issue and service of summons in error and enter their general appearance herein.

Locher, Green & Woods, Attorneys for Defendants in Error. Edward C. Stanton, Prosecuting Attorney, Cuyahoga County, by E. J. Thobaben, Asst. Pros. Atty., Attorneys for John A. Zangerle County Auditor.

In Court of Common Pleas of Cuyahoga County

Docket and Journal Entries

February 16, 1926.—Petition and precipe filed and summons issued.

February 23, 1926.—Answer of John Zangerle filed.

February 26, 1926.—Motion by The Board of Park Commissioners to advance filed.

February 26, 1926.—Answer of Defendants Board of Park Commissioners, etc., filed.

February 26, 1926.—Answer of The Union Trust Company filed.

[fol. 65] February 25, 1926.—Summons returned endorsed: On the 17th day of February, 1926 I served this writ on the within named John A. Zangerle, Wm. A. Stinchcomb by delivering a true and certified copy thereof with all the endorsements thereon. On the same date I served this writ on the within named The Board of Park Commissioners of the Metropolitan Park District of Cleveland by handing a true and certified copy thereof with all the endorsements thereon to E. P. Barklet, Managing Agent of said Co. The president or other chief officers of said Co. not found in my county. On the 18th day of February, 1926 I served this writ on the within named Warren S. Hayden, Louis E. Moses, by handing to each of them a true and certified copy thereof with all endorsements thereon. On the same date I served this writ on the within named The Union Trust Company a corp. by handing a true and certified copy thereof with all the endorsements thereon to C. S. Bichberger, managing agent of said Company. The President or other officers of said Co. not found in my county. The within named Harry M. Farnsworth not found in my county. Sheriff's Fees $2.37.

March 8, 1926.—Amended petition filed.

March 12, 1926.—Answer to Amended petition filed.

March 13, 1926.—Answer to Amended petition filed.

March 13, 1926.—Answer to Amended petition filed.

March 25, 1926.—Demurrer of The Board Park Commissioners filed.

April 7, 1926.—Brief by Plaintiff filed.

April 8, 1926.—To Court: The motion by the defendant to advance is granted, and this cause is advanced to Equity Trial List for March 15, 1926. Journal 242, Page 1196.

[fol. 66] May 4, 1926.—To Court: The demurrer by the defendant, The Board of Park Commissioners, etc. to interrogatories attached to the petition is overruled as to Nos. 10, 11, 12 and 16 and sustained as to others, to which each party excepts. Journal 243, page 537.

May 27, 1926.—Answer filed.

July 1, 1926.—Motion by The Board of Park Commissioners to advance filed.

July 13, 1926.—To Court: The motion by the defendants, The Board of Park Commissioners, etc., to advance is overruled. Journal 244, page 147.

September 10, 1926.—Motion to advance filed.

September 10, 1926.—To Court: The motion by the defendants, The Board of Park Commissioners, etc. to advance is granted and this cause is advanced to Equity Trial List for September 20, 1926. Journal 245, page 47.

February 5, 1927.—Motion by Plaintiff for New Trial filed.

February 5, 1927.—Motion by Plaintiff for rehearing filed.

February 21, 1927.—To Court: The motion for a new trial is overruled, to which the plaintiff excepts. Journal 246, page 936.

February 21, 1927.—To Court: The motion for a rehearing is overruled, to which the plaintiff excepts. Journal 246, page 936.

May 5, 1927.—To Court: This cause coming on for trial, and the defendants being all duly served with process, the same was heard upon the pleadings and the evidence, and in consideration thereof, and being fully advised in the premises, the Court finds for the defendants, and the plaintiff having first withdrawn her request that the Court make [fol. 67] a separate finding of its conclusions of fact and law, judgment is rendered in favor of the defendants, to which plaintiff excepts, and notice of appeal by her being given, bond for said purpose is filed at $500.00. The Court further finds that the plaintiff has just and reasonable grounds for instituting this cause, and which has been vigorously prosecuted on her behalf by her attorney,

George D. Hile, and at costs and expenses incurred in so doing, to the amount of $300.00, which sum is awarded as a judgment against the County, and to be paid out of the County Treasury upon the warrant of the auditor issued upon the County Treasurer in favor of George D. Hile, in the sum of $300.00. Journal 247, page 672.

June 21, 1927.—Appeal bond by Plaintiff to Court of Appeals in $500.00 with E. H. Bryant as surety filed.

(Duly certified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

AMENDED PETITION—Filed March 8, 1926

Plaintiff says that she is a taxpayer in Bay Village, which is located in Cuyahoga County and that she resides in said Village; that she brings this action as a taxpayer on behalf of the taxpayers of said Village, and for the benefit of Cuyahoga County and the taxpayers thereof; after having made written demand on the — day of January, upon Edward C. Staton, Prosecuting Attorney for Cuyahoga County that he institute this action and his refusal in writing to do so.

Plaintiff says that John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that [fol. 68] Harry A. Farnsworth, Warren S. Hayden and Louis E. Moses constitute the Board of Park Commissioners of the Metropolitan Park District in Cleveland, Ohio; and that defendant Wm. A. Stinchcomb is Secretary of said Park Board and appointed by the Commissioners of said Board and that The Union Trust Company is an Ohio banking corporation.

Plaintiff complaining of defendants and for her cause of action says that said Park Board Commissioners, defendants, on or about the — day of December, 1925, entered into a written agreement with The Union Trust Company of Cleveland, Ohio, defendant herein, whereby said The Union Trust Company gave to the Board of Park Commissioners of the Metropolitan Park District of Cleveland the right to acquire the title to the following piece of property, to-wit:

Situated in the Village of Bay, Cuyahoga County, and State of Ohio, and known as being part of original Dover Township, Lot No. 94, and bounded and described as follows: Beginning on the Southeasterly corner of said Original Lot No. 94; thence Westerly along the Southerly line of said original lot No. 94, (which is also the center line of Wolf Road, 60 feet wide) to the south-easterly corner of land conveyed to Seth Johnson by deed dated July 6th, 1842 and recorded in Vol. 31, page 427 of Cuyahoga County Records; thence Northerly along the Easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie; thence Easterly along the southerly shore of Lake Erie to the Easterly line of said original lot No. 94; thence southerly along said Easterly line of original Lot No. 94 to the place of beginning, excepting therefrom that part of Westlake Road, within bounds of the above described [fol. 69] premises and excepting therefrom land conveyed to The Lorain and Cleveland Railway Company by deed dated November 18th, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less but subject to all legal highways.

which it recently acquired title to by deed from George F. Koelliker subject to mortgages thereon aggregating Two Hundred and Fifty Thousand ($250,000.00) Dollars; that on or about December 5th, 1925, which was the date that said Koelliker conveyed the title to the above described premises to The Union Trust Company, the Board of Park Commissioners of the Metropolitan Park District in Cleveland entered into a written contract or option with the defendant, The Union Trust Company.

Plaintiff believes and alleges the fact to be that said Park Board Commissioners by the terms and provisions of the contract heretofore mentioned are given the option of acquiring the legal title to the above described land on or before the first day of October, 1928, subject to Two Hundred and Fifty Thousand ($250,000.00) Dollars in mortgages thereon mentioed above, providing said Park Board Commissioners pay or cause to be paid to The Union Trust Company an additional sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, and in additon and as a further consideration for securing the

said optional contract are required to pay the taxes and assessments on said land and to pay the insurance premiums on all the fire or other insurance policies placed upon the buildings on said land above described during the term said optional contract is in force and also during the time said contract is in force that said Park Board [fol. 70] Commissioners are given the right to take possession of said lands and place a keeper or persons in charge of same without any expense or costs to The Union Trust Company.

Plaintiff says that said Park Board of Commissioners had or have no legal right to enter into said optional contracts and incur the obligations above mentioned requiring the expenditure of public funds for the following reasons:

First. That the Auditor of Cuyahoga County never certified that the funds to meet said obligations were in the Treasury or available, or in the process of collection for said purpose before said optional contract was entered into.

Second. That said Park Board Commissioners have no legal authority under Section 2976-7 G. C. or the general law to authorize the expenditure of public funds for options on land or pay keepers or persons put in charge thereof by them during the running of an option taken thereon as it is speculative and against public policy.

Plaintiff says premises above described are located above five (5) miles from any land now constituting a part of said Metropolitan Park System; that no lake nor lakes, submerged or swamp lands are upon said premises above described nor are there any perpetual running streams thereon and only very little small timber, which is on the southerly portion thereof and that there are no natural resources of any kind on or under the premises above described and that said land possesses none of the character- [fol. 71] istics of land mentioned in Section 36 Article 2 of the Constitution of Ohio, but that all of said land above described is admirably suited and fitted for allotment purposes for high class homes as said Park Board of Commissioners well know but who have as plaintiff believes and alleges the fact to be purposely secured the aforesaid men-

tioned option thereon with the view of ascertaining whether they can secure control of Cahoun Memorial Park, consisting of about One Hundred and Fifteen (115) acres of land located in Bay Village to which Village J. J. Cahoun gave said land for a memorial park subject to and upon conditions which said Bay Villiage nor its officials have no legal right to delegate to said Park Board Commissioners of the Metropolitan Park District in Cleveland to carry out or comply with, without forfeiting the said Village's right and title to said land constituting said Cahoun Memorial Park to the heirs of said J. J. Cahoun; that said park lies a little east of the above described premises which the said Park Board Commissioners will have no use for nor desire to secure for park purposes unless they can secure control of said Cahoun Park land.

Plaintiff says the lands above described constitute about one-sixteenth (1/16) of the land of tax valuation on the tax duplicate of Bay Village, Ohio, which if conveyed to or becomes a part of said Metropolitan Park System will be taken off the tax duplicate of said Village and that of the County and thereby impose a higher rate of taxes upon the balance of the land in said Village.

Plaintiff says that said Park Board Commissioners herein have no lawful right to do the acts and things herein complained of conferred upon them by virtue of an Act [fol. 72] passed by the General Assembly March 6th, 1917, 107 Ohio Laws page 65, and one passed by said body April 9th, 1919, 108 Ohio Laws Part Second, page 1097, as both of said acts are unconstitutional and void, being special acts, conferring corporate powers in violation of section 1 of Article XIII, of the Constitution of Ohio, and for the further reason, that under said Acts the authority to make application for the creation of the Park District within a county is conferred upon a majority of the electors residing within the proposed district or in lieu thereof by resolution adopted by one of the legislative or quasi legislative bodies named in Section 2976-2 of the General Code, that under said acts neither the electors nor taxpayers are permitted to vote upon the question as to what territory shall be embraced within the application for creating a Park District, nor after it has been created

are the taxpawers or electors in said Park District permitted to vote upon the question as to whether said Park District, as ordered created by the Probate Judge, shall or shall not be approved by a majority vote of the electors therein residing, none of whom have been summoned in, or before the court, so that any order or decree can be entered by said court, that is valid under the due process of law, provided in Section 1, Article XIV of the Constitution of the United States, and the fundamental law of Ohio; that the determining of what the geographical boundaries of a territory shall be, is a political or legislative question, which cannot be delegated to the judiciary, by the General Assembly. And Sections 2976-3 and 2976-4 of General Code are unconstitutional for said reason; that Section 2976-5 General Code delegates to the judiciary the right to appoint Park Board Commissioners, who are not even, [fol. 73] by said Acts, required to be electors, voters, or even residents of the Park District, County or state, nor for whom the electors of the Park District are not permitted to vote; but who by the provisions of said two acts mentioned above are declared to be a body politic and corporate, capable of suing and being sued as a board, and as such employ a Secretary and such other employees as may be necessary in the performance of the powers therein conferred; to acquire lands within or without such district by purchase or condemnation proceedings or by agreement with other public authorities, empowered to improve and delevop land acquired and levy assessments for the cost therefor, as in Section 2976-9 General Code provided, and to which Board of Park Commissioners by Section 2976-10 General Code is empowered to levy taxes upon all the taxable property within such district, in an amount not in excess of one-tenth (1/10) of a mill upon each dollar of its assessed value, of the property in the district, in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law; which levy the budget commission in the County in which said District is located, shall, unless modified by it, due the combined maximum levy for all purposes provided by law, certify to the County Auditor, who is required to place said levy upon the tax duplicate, that the County treasurer of the

County wherein said district is located, shall be the custodians of the tax funds and who, together with the Auditor of the County are made, by Section 2976-10b, General Code, ex officio officers of said Park Board, but who in fact, by the provisions of said two acts, are made the ministerial agents of said Park Board Commissioners; none of whom are [fol. 74] elected and in no way answerable to the electors or taxpayers nor if removed given the right to choose a successor or successors that under the provisions of section 2976-10d, General Code, territory whether within or without a County, if adjacent and contiguous may be annexed to any existing park district, as therein provided, which is illegal; First, for the reason that it initiated by a petition signed by a majority of the electors residing in the district proposed to be annexed, or by not less than fifty electors therein; Second, that to the said Park Board Commissioners is delegated the sole right of determining whether said petition shall be acted upon favorably, and steps taken in probate court to annex, or of their own motion file such petition with the probate court, in a County to whom they are in no way answerable, nor over whom he has any control, nor the taxpayers or electors residing within the territory that may be annexed, and which deprives them of their constitutional right of self-determination. Not only as to whether the territory shall be annexed, but the natural and inherent right of saying, whether they wished to be taxed; that under the provisions of Section 2976-10e, General Code, when territory is annexed to a Park District, created in another County, that the budget commission of such County and the Auditor and Treasurer thereof are subjected to the mandatory requirements, imposed on them by Sections 2976-10 and 2976-10b General Code, which shaid Park Board Commissioners can inforce in each and all counties, as said two acts authorized and enabled said Park Board Commissioners to levy taxes of different rates in the territory in each County where territory is annexed, in violation of the uniform rate provision in Section 2 of Article 12 of the [fol. 75] Constitution of Ohio; for under the provisions of the Acts herein complained of each County budget commission, and the officers named therein, are independent bodies or officials, severally dominated by the Park Board Com-

missioners, to whom, by said two acts herein mentioned, is delegated the greatest authority of sovereign power,—that of levying taxes,—and which the defendants. Park Board Commissioners have been and will continue to levy, not for the purpose of acquiring lands of the character and for the purposes enumerated in Section 36 of Article II of the Constitution of Ohio, to any extent, but mostly farm lands, suitable for allotting and high class residential purposes; that the Exhibit "A", hereto attached and made a part of this petition, as though incorporated, shows thereon, in heavy black, what said Park Board Commissioners have, or claim to have acquired the title to; and that in dotted black, land they have in some manner tied up or propose to acquire, as empowered by said two acts. The major portion of which is to be used for constructing boulevards over to connect up to the various tracts marked in heavy black on said Exhibit "A", but not for the purposes enumerated in section 36 of Article II of the Constitution; that said Park Board Commissioners have acquired title to about sixty-five hundred (6500) acres of land, about three hundred (300) acres being in Hinckley Township, Medina County, Ohio, which was annexed in 1923; about Four Hundred (400) acres being in Lake County, Ohio; and the balance being in Cuyahoga County; and that, in each of the said three counties, said Park Board Commission now has pending condemnation actions to acquire land, not for the purposes, and of the character, enumerated in said — 36 of Article II, heretofore referred to; [fol. 76] that Section- 2976-10g and 2976-11h are unconstitutional, due to delegation to said defendants, Park Board Commissioners, the power to enact penal measures, and exercise police powers and clothe all their employees with powers of police officers.

That said Park Board Commissioners herein and contrary to the objects to be attained by Section 36 of Article II of the Constitution of Ohio have acquired lands, which the county commissioners of Cuyahoga County need for the purpose of sewers, for the public's good and welfare, and which said Park Board Commissioners refuse to permit said County officials from entering upon or using for public purposes; that said Commissioners can, by virtue of said two acts mentioned above, ex officio by acquiring all of the

land in any township or townships, destroy a township government, or even that of a County; that all lands acquired by them is exempted from taxation and the burden of public debt falls upon the other land.

That said Park Board Commissioners have been expending large sums of money, without warrant, and not in furtherance of accomplishing the objects mentioned in Section 36 of Article II of the Ohio Constitution; that the pay roll of said Board, not including a salary for its Secretary of Ten Thousand ($10,000.00) Dollars per year, was for 1922, Fifty Thousand Seven Hundred Twenty-six and 40/100 ($50,726.40) Dollars; for 1923, Forty-seven Thousand Seven Hundred Twenty-five and 17/100 ($47,725.17) Dollars; for 1924, Forty-four Thousand Seven Hundred ($44,700.00) Dollars; for 1925, Ninety-nine Thousand Seven Hundred Thirteen and 16/100 ($99,713.16) Dollars, in which sums Attorney fees are included, which said two acts do not authorize said Park Board to employ, and the statutes for-
[fol. 77] bid; that said employees consist of engineers, draftsmen, carekeepers, and useless supernumeraries; that said Park Board have and will continue to expend public funds, not for the public's good or welfare, but to its loss and detriment, and should be restrained and perpetually enjoined from doing so.

Plaintiff says that said Park Board Commissioners are either public officers, holding said office in violation of Section 20 of Article 2 of the Constitution of Ohio, due to not having been elected and in violation of section 27 of said Article and section 1 of Article X of said Constitution, requiring all officers to be elected, yet have taken the oath of office required by Section 7 of Article XV of the Constitution of Ohio; or the members of said Park Board hold their said positions under said two acts analogous to directors in a private corporation, due to the passage of special acts conferring corporate powers, plenary to the extremes, which the said Park Board Commissioners can and do arbitrailry use, and should be restrained and perpetually enjoined from doing, any of the acts and things authorized to be done under the provisions of said two acts above stated, all of which provisions violate the provisions of the Constitutions herein set forth, and that said two acts contain more than one subject, inhibited by Sec. 16, of Article II, Ohio Constitution.

That the Metropolitan Park District, when first established by virtue of Acts above mentioned, comprised all of Cuyahoga County, Ohio, excepting the territory constituting Bay Village, which was later annexed; and that by reason thereof the benefits of the Act passed by the General Assembly on April 17th, 1925, 111 Ohio Laws, page [fol. 78] 504, cannot be availed of or enjoyed by the people of the township in Cuyahoga County or in Hinckley Township in Medina County; and, said law cannot have uniform operation throughout the state in violation of section 26 of Article II of the Constitution of Ohio, and are denied the equal protection of the law guaranteed by Section 1, of the 14th Amendment to the Federal Constitution; that under provision of Section 1 of Article II of the Constitution of Ohio, the General Assembly cannot delegate to its said Park Board Commissioners the powers conferred by said two acts above mentioned, for they are not a governmental body, but exercise powers not unlike County Commissioners, yet are not elected as required by Section 2 of Article X of the Constitution of Ohio and who are by said Acts complained of, in truth and fact County Officers, who can and do exercise over the County Officers, named in said legislation, in any County, a part or all of which has been annexed, independent of other counties, a part or all of which has been annexed to said Park District, not only to the detriment of the people therein as well as the State at large, and that to enact the aforesaid mentioned acts was not within the power of the General Assembly under the Constitution of Ohio and are void.

Plaintiff says she has no adequate remedy at law by which she can prevent the Park Board Commissioners, defendants herein, from doing the acts and things herein complained of and that a court of equity only can grant relief to which she is entitled, by restraining and perpetually en- [fol. 79] joining the said defendants.

Wherefore plaintiff prays that a restraining order be granted restraining said John A. Zangerle, Auditor of Cuyahoga County from honoring any orders, bills or claims, of any kind or nature presented or issued to him by the Park Board of Commissioners, to-wit: Harry M. Farnsworth, Warren S. Hayden and Louis E. Moses, or Wm. A. Stinchcomb, Secretary of said Board requiring the said Auditor to issue his warrants therefor upon the Treasurer

of Cuyahoga County and that said John A. Zangerle be restrained and perpetually enjoined from issuing any future warrants for any bills, claims or demands of any kind or character upon the Treasurer of Cuyahoga County, for the payment of any obligations of any kind or character incurred for the purposes alleged in the above petition and for any other purpose and that said Park Board Commission and the members thereof above named, and the Secretary of said Board be restrained and perpetually enjoined from incurring obligations requiring the further expenditure of public money and that the court find that the optional contract entered into by said Park Board Commission with The Union Trust Company be declared illegal and void and held for naught and that such other and further relief be granted as in law or equity the Court will find necessary and proper in the premises, and declare said Metropolitan Park District Act unconstitutional.

Geo. D. Hile, Attorney for Plaintiff.

(Duly verified.)

[fol. 80] INTERROGATORIES

Defendant, Park Board Commissioners, are asked to answer the following questions:

1. What portion of the land acquired by you, was, when title was secured: (1) Covered with virgin forest? (2) Cleared land? (3) Devoted to or suitable for farming?

2. How many acres, if any, of the above classes of lands have you proceeded to reforest with trees native of northern Ohio?

3. How many acres of land have you acquired in Lake County, Ohio and in Medina County, Ohio?

4. How many condemnation suits have you now pending in the counties last above named, and how many in Cuyahoga County, Ohio? How many parcels of land are there enumerated in said suits?

5. How many acres of land have you purchased in Lake County, Ohio, from whom and how much per acre did the Grantees receive?

6. What were or are the natural resources upon the lands you have purchased for the Metropolitan Park District of Cleveland, that you have conserved by acquiring said lands?

7. How many, if any, natural lakes are there upon the lands you have purchased?

8. How many acres of submerged land, and how many of swamp land and how many acres of submerged land is there upon the lands that you have acquired title to?

[fol. 81] 9. Do you receive any rentals or income from any of the lands embraced within the Metropolitan Park District of Cleveland?

10. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?

11. Are there any perpetual running streams on the land described in this petition? Is the John Huntington land suitable for high grade residence purposes?

12. Are there any natural lakes, swamp or submerged land on said John Huntington land and how much of each, if any?

13. How many of your appropriation suits have been conducted by the prosecutor of Cuyahoga County?

14. How many of your appropriation suits have been conducted by the firm, Messrs. Locher, Green and Woods?

15. How much money have you paid each year to Messrs. Locher, Green and Woods?

16. Have you a contract or option for the purchasing of the John Huntington land described in the petition? If so what are the terms and conditions thereof?

In Court of Common Pleas of Cuyahoga County

Answer of John A. Zangerle—Filed March 13, 1926

Comes now John A. Zangerle, one of the above named defendants, and for his answer to the petition of the plain-

tiff herein, admits the official capacity of the defendants as [fol. 82] alleged; that a request was made by the plaintiff to the Prosecutor of the County aforesaid to bring an action upon the cause set forth in the petition herein and that the Prosecutor declined so to do.

Saving the foregoing admissions, this defendant denies each and every averment in said petition contained.

Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, by E. J. Thobaben, Assistant Prosecuting Attorney.

(Duly verified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

ANSWER BY THE BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT, HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS A. MOSES, AND WM. A. STINCHCOMB—Filed March 13, 1926

Now come the Board of Park Commissioners of the Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis A. Moses, and Wm. A. Stinchcomb, defendants herein, and for answer to the amended petition of the plaintiff herein, admit that said plaintiff is a taxpayer in Bay Village, Cuyahoga County, Ohio, and that she resides in said Village; that demand was made by plaintiff upon Edward C. Stanton, Prosecuting Attorney for Cuyahoga County, as alleged; that [fol. 83] John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that Harry M. Farnsworth, Warren S. Hayden and Louis A. Moses, constitute the Board of Park Commissioners of the Cleveland Metropolitan Park District; that Wm. A. Stinchcomb is Secretary of said Board and appointed by said Commissioners; that The Union Trust Company is a corporation as alleged; and that said Board of Park Commissioners have acquired large areas of land, aggregating more than 5500 acres, for the purpose for which said Board is by law authorized to acquire lands.

Further answering, these defendants deny each and every other allegation in said amended petition contained and not herein expressly admitted.

Locher, Green & Woods, Attorneys for Defendant. Board of Park Commissioners of the Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis A. Moses and Wm. A. Stinchcomb.

(Duly verified.)

In Court of Common Pleas of Cuyahoga County

Answer by the Union Trust Company—Filed March 13, 1926

Now comes The Union Trust Company, defendant herein, and for answer to the amended petition of the plaintiff herein, admit that said plaintiff is a taxpayer in Bay Vil- [fol. 84] lage, Cuyahoga County, Ohio, and that she resides in said Village; that demand was made by plaintiff upon Edward C. Stanton, Prosecuting Attorney for Cuyahoga County, as alleged; that John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that Harry M. Farnsworth, Warren S. Hayden and Louis A. Moses, constitute the Board of Park Commissioners of the Cleveland Metropolitan Park District; that Wm. A. Stinchcomb is Secretary of said Board and appointed by said Commissioners; that The Union Trust Company is a corporation as alleged; and that said Board of Park Commissioners have acquired large areas of land, aggregating more than 5500 acres, for the purpose for which said Board is by law authorized to acquire lands.

Further answering, these defendants deny each and every other allegation in said amended petition contained and not herein expressly admitted.

Locher, Green & Woods, Attorneys for Defendant, The Union Trust Company.

(Duly verified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

DEMURRER BY THE BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT TO THE INTERROGATORIES—Filed March 25, 1926

Now comes the Board of Park Commissioners of the Cleveland Metropolitan Park District, defendant herein, [fol. 85] and demurs to the interrogatories attached to the petition of the plaintiff herein on the grounds that said interrogatories are not relevant or material to the issues in this cause.

Locher, Green & Woods, Attorneys for Defendant, the Board of Park Commissioners of the Cleveland Metropolitan Park District.

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

ANSWER OF THE DEFENDANT, BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT, TO INTERROGATORIES—Filed May 27, 1926

Now comes the Board of Park Commissioners of the Cleveland Metropolitan Park District, defendant herein, and reply to certain of the interrogatories attached to the amended petition herein, makes reply to the tenth, eleventh, twelfth, and sixteenth of said interrogatories as follows:

Tenth Q. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?

A. Its adaptability for general public recreational uses, by reason of its location, topography, and lake frontage.

Eleventh Q. Are there any perpetual running streams on the land described in this petition? Is the John Huntington land suitable for high grade residence purposes? [fol. 86] A. (a) There is a running stream upon the property, which is of practically continuous flow. (b) In part.

Twelfth Q. Are there any natural lakes, swamp, or sub-

merged land on said John Huntington land, and how much of each, if any?

A. The property borders on Lake Erie for a distance of approximately 2,000 feet. The land within the bed of the stream mentioned in Question 11 is submerged, and a portion of the land adjacent to said stream is swampy. The areas of such natural lakes, submerged and swampy lands cannot now be given, as surveys are necessary to that information, and no such surveys have been made.

Sixteenth Q. Have you contract or option for the purchase of the John Huntington land described in the petition? If so, what are the terms and conditions thereof?

A. The Board of Park Commissioners of the Cleveland Metropolitan Park District has no contract or option for the purchase of the John Huntington property unless a written agreement entered into by and between William R. Huntington, Margaret Huntington Smith, and John H. Hord, as First Parties, The Union Trust Company, as Second Party, and George B. Koelliker, as Third Party, should be deemed to constitute such contract or option. This agreement recites that with the knowledge and consent and approval of the First Parties, the Third Party has conveyed the premises to the Second Party, and provides that the Second Party shall hold the legal title to such premises and make conveyance thereof upon the terms and conditions specified in the agreement; provides that immediately upon the execution of such agreement, the Second Party shall execute its limited warranty deed of said premises to [fol. 87] the Board of Park Commissioners of the Cleveland Metropolitan Park District, which deed shall be held in the escrow department of the second party and be delivered to said Board of Park Commissioners upon said Board complying with and fulfilling certain terms, to-wit:

1. That said Board shall on or before October 1927, pay to The Union Trust Company the sum of $300,000.00 in cash, and assume and agree to pay $200,000.00 note and mortgage described in the agreement.

2. That said Board shall, as same become due and payable, pay the taxes and assessments now or hereafter levied upon said premises, beginning with the taxes and assessments for the first half of the tax year 1925.

3. That said Board shall keep said premises in good and tenantable condition of repair, and shall maintain fire insurance upon the buildings and improvements located thereon to the amount of their reasonable insurable value, which policies of insurance are to — made payable to the Second Party and are to be deposited with it.

4. That said Board shall have the use and occupancy of said premises from and after the date of the agreement, but during such occupancy and until the aforesaid deed shall have been delivered to it, it shall not in any substantial manner change or modify the surface of said premises, nor change, modify or remove any of the buildings, plantings and other improvements now located on said premises.

5. That if said Board shall fail, neglect, or refuse to keep and perform any of the terms and conditions in paragraphs 1, 2, 3, and 4, hereinbefore recited, then it shall immediately forfeit all its rights, claims, and privileges therein, and said deed, so delivered in escrow, shall forthwith be returned [fol. 88] to The Union Trust Company and be by it destroyed and said The Union Trust Company shall thereafter hold title to said premises and convey same as further provided in said agreement.

Locher, Green & Woods, Attorneys of Defendant, the Board of Park Commissionres of the Cleveland Metropolitan Park District.

(Duly verified.)

In Court of Common Pleas of Cuyahoga County

Motion for a New Trial—Filed Feb. 5, 1927

The plaintiff moves the court for a new trial for the following reasons, to-wit:

1. The court erred in admitting evidence offered on behalf of the defendants, to which the plaintiff objected.

2. The court erred in rejecting evidence offered by the plaintiff, and to which plaintiff excepted.

3. The court found for the defendants when it should have found for the plaintiff.

4. The judgment was given for the defendants when it should have been given for the plaintiff.

5. The said findings and judgment are contrary to law.

6. The court erred in its findings and conclusion of law.

7. That the court erred in holding; 1. that the defendant Park Board Commissioners have the right or power to em- [fol. 89] ploy attorneys and pay them out of public funds; 2. to hire automobiles and pay for the use of them out of public funds; 3. to pay for abstracts furnished by persons from whom said Board purchases land; 4. and to expend money to secure the possession and enjoyment of the John Huntington Farm by paying and agreeing to pay all taxes and special assessments levied against said farm during the time that said Park Board has in possession and enjoys the use of the same.

Geo. D. Hile, Attorney for Plaintiff.

In Court of Common Pleas of Cuyahoga County

Motion for a Rehearing—Filed Feb. 5, 1927

Plaintiff asks this Honorable Court that she be granted a re-hearing or an opportunity to re-argue the same more fully. That the constitutional questions involved are of such paramount importance to justify the court in granting this request. Furthermore, that the power of The Metropolitan Park District Board to employ attorneys, pay for abstracts, furnished by persons from whom it buys property, to hire automobiles and pay for the use thereof, and to secure the possession of property, to-wit, the John Huntington Farm and enjoy the possession thereof by paying all taxes and special assessments levied against it in consideration of having the use and possession of said farm, are powers and rights not conferred upon Park Board Commissioners expressly or by implication by the statutes [fol. 90] of Ohio, which questions the court should grant the privilege of allowing the plaintiff's request in this motion.

Geo. D. Hile, Attorney for Plaintiff.

In the Court of Appeals of Cuyahoga County

Docket and Journal Entries, with Findings of Fact and Conclusions of Law

June 2, 1927.—Transcript, Original Papers from Common Pleas filed. Appeal bond in $500.00 with E. H. Bryant, as surety, filed.

April 30, 1928.—Brief of Plaintiff in error, and two copies filed.

May 3, 1928.—Request by Plaintiff for finding of fact and Law filed.

July 12, 1928.—To Court. This cause came on this day to be heard on the amended petition and subsequent pleadings and the evidence and the plaintiff herein having made and filed a request in writing before judgment for a finding of facts herein separate and apart from the conclusions of laws, the court now therefore makes the following

Findings of Fact

1. The relator, Pauline Wadsworth, is, and at the time of starting this action was, an adult taxpayer of Cuyahoga [fol. 91] County, and before bringing this suit she made written demand upon the prosecuting attorney of said county to commence action against the defendants upon the same grounds and for the same relief as in the petition set forth, which demand was refused.

2. The defendants are, and at the time this cause was begun they were, holding and occupying, and except as herein otherwise indicated, qualified to hold and occupy, the offices and positions herein ascribed to them respectively.

3. Neither the Board of Park Commissioners of the Metropolitan Park District in Cleveland, nor any of its members, is an elective or an elected officer or officers.

4. Said Board and the members composing it claim and exercise the right to levy taxes, both with and without a vote or votes of the electors in said District, and they have hitherto levied and collected taxes on the property therein, including the propery of relator, and will continue so to do unless enjoined.

5. That said District was originally organized and now exists in conformity with the statutes of Ohio, which purport to authorize it, and as first established it embraced less than all the territory and land within the county of Cuyahoga; but by subsequent proceedings in accordance with the said act it afterwards became co-extensive with said county, and thereafter by further proceedings, consonant with said statute and its amendments, the whole of Hinckley township in Medina County, Ohio, became and is annexed to said District, and said Board has furthermore acquired title to land in Lake County, which is not annexed.

[fol. 92] 6. Said Board has, by resolutions from time to time passed by its members, authorized the doing, and itself and its agents have done and performed, the following matters and things, and unless enjoined will continue hereafter to do the like, namely:

(a) Employing attorneys to represent it in litigation and other matters and paying moneys to such attorneys out of funds under its control derived from taxation, whereof, between September 1, 1923, and January 1, 1927, it has paid for legal services, as disclosed by its payroll, the sum of $13,556.38.

(b) Expending money for automobile hire and trucking out of funds under its control, derived from taxation, whereof, for the years 1923 to 1926, both inclusive, it has expended for said purposes, the sum of $10,001.81, which expenditures were incurred in furtherance of activities authorized by the statutes under which said Board operates.

(c) Entering into a written contract for the clearing of about thirty acres of land in Hinckley township aforesaid, building a dam and creating an artificial lake to cover said thirty acres and additional land, and expending therefor from funds under its control, derived from taxation, the sum of $5,913.00, and further expending from such fund for the dam and lake aforesaid, the further sum of $80,605.45, and by supplemental contract or additional work thereon the further sum of $31,004.88, and by another written contract supplemental to the last mentioned one, it expended from like funds the further sum of $6,055.26; for

all of which expenditures in Medina County the Auditor of Cuyahoga County previously issued his certificate that the funds for meeting the obligations so paid were on hand and available to pay the same.

[fol. 93] 7. That the Union Trust Company of Cleveland, Ohio, wrote to said Board the letter, and thereupon the resolution embodying said letter was passed by said Board, as follows:

"Resolution No. 949, By Mr. Farnsworth (Huntington Property)

Whereas the Union Trust Company, of Cleveland, Ohio, holding legal title to the following described premises, put in trust for William R. Huntington, Margaret Huntington Smith and John H. Hord, has filed with this Board, for and on behalf of itself and its trust, its offer under date of December 7, 1925, to sell and convey to this Board certain premises hereinafter described as follows:

Situated in the Village of Bay, County of Cuyahoga and State of Ohio, and known as being part of original Dover Township Lot No. 94, and bounded and described as follows:

Beginning on the south easterly corner of said original lot No. 94;

Thence westerly along the southerly line of said original lot No. 94; (which is also the center line of Wolf Road 60 feet wide), to the south easterly corner of land conveyed to Seth Johnson by deed dated July 6, 1842, and recorded in Volume 31, page 477 of Cuyahoga County Records;

Thence northerly along the easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie;

Thence easterly along the southerly shore of Lake Erie to the easterly line of said original lot No. 94;

Thence southerly along said easterly line of original lot No. 94; to the place of beginning, excepting therefrom that part of Westlake Road, within the bounds of the above described premises, and excepting therefrom land conveyed [fol. 94] to The Lorain and Cleveland Railway Company by deed dated Nov. 18, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less, but subject to all legal highways and waterways;

upon terms and conditions set forth in said offer, as follows:

'Cleveland, Ohio, Dec. 7, 1925.

The Board of Park Commissioners of the Cleveland Metropolitan Park District, Old Court House, Cleveland, Ohio.

GENTLEMEN: The Union Trust Company, of Cleveland, Ohio, holding legal title to the following described premises, hereby offers to sell to the Board of Park Commissioners of the Cleveland Metropolitan Park District, the following described premises:

Situated in the Village of Bay, County of Cuyahoga and State of Ohio, and known as being part of original Dover Township, lot No. 94, and bounded and described as follows:

Beginning on the south easterly corner of said original Lot No. 94; thence westerly along the southerly line of said original Lot No. 94, (which is also the center line of Wolf Road, 60 feet wide), to the south easterly corner of land conveyed to Seth Johnson by deed dated July 6, 1842, and recorded in Volume 31, page 477 of Cuyahoga County Records; thence northerly along the easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie; thence easterly along the southerly shore of Lake Erie to the easterly line of said original Lot No. 94; thence south-
[fol. 95] erly along said easterly line of original lot No. 94, to the place of beginning, excepting therefrom that part of Westlake Road, within the bounds of the above described premises, and excepting therefrom land conveyed to The Lorain and Cleveland Railway Company by deed dated Nov. 18, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less, but subject to all legal highways and waterways.

for the following consideration and under the following conditions, to wit:

First. The Union Trust Company shall forthwith execute and deliver to the escrow department of said bank, a deed with covenants of Limited Warranty warranting only as against all lawful claims and demands whatsoever, of all persons claiming by, through, from or under any act of said The Union Trust Company, excepting, however, all taxes and assessments now levied or hereafter levied upon said

premises, and excepting and subject to a mortgage of $200,000.00 on said premises, conveying said premises to the Board of Park Commissioners, of the Cleveland Metropolitan Park District.

Second. The Board of Park Commissioners of the Cleveland Metropolitan Park District shall on or before October 1st, 1927, pay to said The Union Trust Company, the sum of Three Hundred Thousand Dollars ($300,000.00), in cash, and accept and take title to said premises, subject to the aforesaid mortgage of $200,000.00; and thereupon, said limited Warranty deed shall be delivered to said Board of Park Commissioners.

Third. Said Board shall, as same become due and payable, pay the taxes and assessments now or hereafter levied upon said premises, beginning with the taxes and assess-[fol. 96] ments for the first half of the year 1925, being the half year taxes and assessments payable in December 1925.

Fourth. That said Board shall have the use and occupancy of said premises until October 1st, 1927, but shall keep said premises in good and tenantable condition of repair, and shall maintain fire insurance upon the buildings and improvements located thereupon to the amount of their reasonable insurable value; said policies of insurance are to be made payable to said The Union Trust Company, and are to be deposited with it. Any sums of money received by The Union Trust Company on account of loss under said policies, shall be used by said The Union Trust Company to repair or restore the property damaged or destroyed but if not so used, same shall be applied toward the reduction of the $300,000.00 cash payment, provided the Park Board shall purchase said premises.

Fifth. That while said Board shall have the use and occupancy of said premises, from and after the date of the acceptance of this proposal, but during such occupancy and until the aforesaid deed shall have been delivered to it, it shall not in any substantial manner change or modify the surface of said premises, nor change, modify or remove any of the buildings, plantings and other improvements now located on said premises.

Sixth. That if said Board shall fail, neglect, or refuse to keep and perform any of the terms and conditions in the preceding five paragraphs, then it shall immediately forfeit all its rights, claims and privileges thereunder, and said deed so delivered in escrow as aforesaid, shall forthwith be returned to The Union Trust Company, and pos- [fol. 97] session of said premises shall immediately be returned to The Union Trust Company, its successors or assigns.

Respectfully submitted.

The Union Trust Company of Cleveland, Ohio, by H. D. Messick, Vice-President, by Wm. A. Hiles, Asst. Secretary.'

Now, therefore, be it resolved by the Board of Park Commissioners of the Cleveland Metropolitan Park District, that the terms and conditions set forth in said offer are acceptable to this Board, subject to the approval of the title of this property by the Legal Counsel of this Board, and that this Board hereby indicates its intentions to purchase said property, upon said terms and conditions. and within the period of time specified in said offer.

Yeas—Messrs. Hayden and Farnsworth.

Nays—None."

8. That the Board of Park Commissioners after the passage of said resolution above, took possession of the premises mentioned in the letter of The Union Trust Company above, and performed the conditions required by its provisions to be performed, and paid the taxes and assessments amounting in all to $13,769.18 for the years 1925 and 1926.

9. That the Auditor of Cuyahoga County never issued any certificate that the funds were on hand or available, or in process of collection to meet the obligations set forth [fols. 98 & 99] in the above letter of The Union Trust Company, which the said Board of Park Commissioners by resolution above accepted.

And for conclusions of law the court finds, upon the issues joined, for the defendants; that the said Sections 2976-1 to 2976-i of the General Code of Ohio are in all respects valid and not in violation of the Constitution of

Ohio or the Constitution of the United States or any provision thereof, and that the proceedings had by the defendants are in all respects legal and valid, and judgment dismissing plaintiff in error's amended petition is entered against her, together with judgment for the costs of this suit, to all of which she excepts.

Journal 7, Page 481.

(Duly certified.)

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed July 26, 1929

The appellant, State of Ohio, ex rel. Pauline Wadsworth, Taxpayer, Bay Village, Ohio, files the following statement of points to be relied upon:

Point One

The Park District Act (General Code of Ohio, Sections 2976-4 et *sqq.*) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that "No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void"; and on motion to vacate this judgment and substitute a judgment of reversal pursuant to the opinion of the majority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be "the supreme law of the land" and that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state

to the contrary notwithstanding," the Supreme Court of Ohio erred in refusing so to do.

[fol. 101] Point Two

This peculiarity in the judicial structure of the Supreme Court of Ohio as illustrated in Board of Education v. Columbus, 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts,—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things,—but solely from the lottery of discordant, inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies the litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV of the same instrument which assures to each state a republican form of government.

Truax v. Corrigan, 257 U. S. 312;
White v. Hart, 13 Wall. 646;
People v. Western Union Telegraph Co., 70 Colo. 90;
Gunn v. Berry, 15 Wall. 610.

Point Three

On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Sec-

tion 4 of Article IV in delegating to non-elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes.

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 294.

[fol. 102] Parks v. Board of Commissioners of Wyandotte County, 61 Fed. 436.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

[fol. 103] [Endorsed:] No. 238. In the Supreme Court of the United States, October Term, 1929. State of Ohio ex rel. Pauline Wadsworth, etc., Appellant, vs. John A. Zangerle, Auditor of Cuyahoga County, et al., Appellees. Statement of points to be relied on by appellant. George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, 914 Williamson Building, Cleveland, Ohio, Attorneys for Appellant.

[fol. 104] Designation of Parts of Record to be Printed

The appellant hereby designates the parts of the record herein to be printed under the supervision of the Clerk of this court, namely:

1. Amended petition filed in Common Pleas Court of Cuyahoga County March 8, 1926, with interrogatories appended thereto.

2. The answers of (a) John A. Zangerle; (b) The Board of Park Commissioners of The Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis E. Moses and William A. Stinchcomb; and (c) The Union Trust Company; all filed in said Common Pleas Court March 13, 1926.

3. Demurrer to interrogatories, filed in said Common Pleas Court March 25, 1926.

4. Answer to interrogatories, filed in said Common Pleas Court May 27, 1926.

5. Motions of plaintiff, (a) for a new trial, and (b) for a rehearing, filed in said Common Pleas Court February 5, 1927.

6. Transcript of docket and journal entries in said Court of Common Pleas.

7. Transcript of docket and journal entries in the Court of Appeals of Cuyahoga County.

8. Petition in error filed in the Supreme Court of Ohio, August 17, 1928.

9. Opinion of Chief Justice Marshall of the Supreme Court of Ohio, accompanying its decision of March 27, 1929.

10. Motion to vacate judgment and for judgment for plaintiff in error, etc., (not including brief supporting motion).

11. Transcript of docket and journal entries of the Supreme Court of Ohio.

[fols. 105 & 106] 12. Petition for appeal and allowance thereof.

13. Assignment of errors and allowance thereof.

14. Citation, waiver of service and entry of general appearance of appellees.

The following parts of the record may be omitted from the printing, namely:

Bond and approval thereof.

Precipe to the Clerk of the Supreme Court of Ohio for transcript to be certified to the Supreme Court of the United States, together with proof or acknowledgment of service of a copy on the appellees on June —, 1929.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

[fol. 107] [File endorsement omitted.]

Endorsed on cover: File No. 34,369. Ohio Supreme Court. Term No. 238. State of Ohio ex rel. Pauline Wadsworth, appellant, vs. John A. Zangerle, Auditor of Cuyahoga County; The Board of Park Commissioners of the Metropolitan Park District in Cleveland, Harry M. Farnsworth, et al. Filed July 12, 1929. File No. 34,369.

FILE COPY

No. 237.

FILE
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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1929.

STATE OF OHIO, EX REL.
E. H. BRYANT,
Appellant,

VS.

AKRON METROPOLITAN PARK DISTRICT FOR
SUMMIT COUNTY,
F. A. SEIBERLING,
EDWARD D. ECKROAD,
MAUDE I. MILAR, and
JACOB MONG, COUNTY AUDITOR,
Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

GEORGE D. HILE and
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
914 Williamson Bldg., Cleveland, Ohio,
Attorneys for Appellant.

No. 237.

In the Supreme Court of the United States

October Term, 1929.

State of Ohio, ex rel.
E. H. Bryant,
Appellant,

vs.

Akron Metropolitan Park District for
Summit County,
F. A. Seiberling,
Edward D. Eckroad,
Maude I. Milar, and
Jacob Mong, County Auditor,
Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

George D. Hile and
Snyder, Henry, Thomsen, Ford & Seagrave,
914 Williamson Bldg., Cleveland, Ohio,
Attorneys for Appellant.

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No. 237.

In the Supreme Court of the United States

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STATE OF OHIO, EX REL.
E. H. BRYANT,
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AKRON METROPOLITAN PARK DISTRICT FOR
SUMMIT COUNTY,
F. A. SEIBERLING,
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MAUDE I. MILAR, and
JACOB MONG, COUNTY AUDITOR,
Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

(a) **Statutory Provisions Sustaining the Jurisdiction.**—U. S. Code, Title 28, §237, concerning writs of error from state courts of last resort, as modified by §861 a (Act of January 31, 1928, Chap. 14, 45 Stats. 54) substituting appeals for writs of error, and §861 b (Act of April 26, 1928, Chap. 440, 45 Stats. 466) making applicable to such appeals the statutes regulating the right to a writ of error and the practice in relation thereto, afford the statutory basis of the jurisdiction here invoked.

(b) **Dates of Judgment Sought to be Reviewed and of Application for Appeal, with References to Record.**—The date of the affirmance by the Supreme Court of Ohio of the judgment of the Court of Appeals affirming that ren-

dered by the Court of Common Pleas of Summit County, Ohio, herein, is March 27, 1929 (Record not yet printed, p. 18); and the date of the overruling by the Supreme Court of Ohio of appellant's motion to vacate said judgment of affirmance and to substitute therefor an entry of judgment for plaintiff in error, appellant here, is June 5, 1929 (R. 18); both of which judgments are sought to be reviewed here. The date on which application for the appeal was presented and allowed is June 13, 1929 (R. 18).

(c) **Showing that the Nature of the Case and of the Rulings Below are within said Jurisdictional Provisions, with References to Record.**—The suit below challenged the validity of the Park District Acts (General Code of Ohio, Secs. 2976-1 to 2976-10i, inclusive) passed by the General Assembly March 6, 1917 (107 Ohio Laws 65), and April 9, 1919 (108 id., Part 2, 1097), upon the ground, among others, that they denied to the taxpayers of said district, including the relator, the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution (R. 34) and were otherwise unconstitutional (R. 34), in that said acts purport to delegate to the Probate Judge of any county in Ohio the power of creating and enlarging such park district within and beyond his county and of appointing commissioners of such district (R. 31, 33), and further delegate to such non-elective commissioners discretionary power to levy taxes (R. 32, 33, 34), to appoint a constabulary and to enact penal measures effective within and adjacent to such districts (R. 33), and also subject the taxpayers within the district to the financial burden of acquiring and maintaining lands outside of it (R. 32).

The case was first tried in the Court of Common Pleas and judgment on the pleadings rendered for defendants. On error, in the Court of Appeals, said judgment was affirmed, and on error in the Supreme Court of Ohio a judg-

ment of affirmance was again entered, the journal entry, however, reciting (R. 19) that

> "it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, *JJ.*) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, *C. J.* and Kinkade, *J.*) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed."

Thereupon the appellant, as plaintiff in error in said Supreme Court of Ohio, filed there an application for a rehearing and motion (which said court overruled) to vacate said judgment of affirmance and for judgment for plaintiff in error, etc., upon the grounds, among others, of repugnancy of the said provision in Section 2 of Article IV of the Constitution of Ohio, in its practical operation and effect as illustrated in this case (and elaborated in that of *Board of Education of Columbus v. Columbus,* 118 Ohio State 295, at pages 296, 298 and 306, showing how, by the same vote of the same judges at the same time in different cases involving the validity of the same statute, such statute is arbitrarily and capriciously made valid in some parts and invalid in other parts of the state), to and in conflict with the Constitution of the United States, including the equal protection and due process clauses of Section 1 of the Fourteenth Amendment and the provisions relating to immunities and privileges and republican form of government in Sections 2 and 4 of Article IV, as follows (R. 72):

> "(1) The provision above set forth and contained in Section 2 of Article 4 of the Constitution of Ohio is

inconsistent and in direct and irreconcilable conflict with that portion of the same section, i. e., Section 2 of Article 4 of the Constitution of Ohio, which provides:

> "'It (the Supreme Court) shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state * * *;'

"that the language last quoted is paramount and controlling over the language first quoted herein, rendering the provision first quoted invalid and unenforceable.

"(2) The portion of Section 2 of Article IV, providing as follows:

> "'No law shall be held unconstitutional and void by the Supreme Court without concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void'—

"is invalid and in conflict with the Constitution of the United States and the following language used therein in Article I, Section 14, known as the Fourteenth Amendment, as follows:

> "'Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws';

"the provision in the Ohio Constitution contained, just herein before set forth, does deny to citizens of Ohio due process of law, and does likewise deny to them the equal protection of the laws.

"(3) The provision in the Constitution of Ohio contained, just hereinbefore set forth, is void and invalid as being repugnant to the letter and spirit of the Constitution of the State of Ohio and likewise the Constitution of the United States in so far as they require and provide for each State having a republican

form of government wherein the will of the majority shall prevail."

See "Statement of Points to be Relied on by Appellant," heretofore filed herein.

(d) **Citation of Cases Sustaining the Jurisdiction.**

Mallett v. North Carolina, 181 U. S. 589;
Truax v. Corrigan, 257 U. S. 312;
Bowman (Missouri) v. Lewis, 101 U. S. 22;
Gunn v. Berry, 15 Wallace 610;
People v. W. U. Tel. Co., 70 Colo. 90;
California Adjustment Co. v. Atchison, etc., R. R. Co., 179 Cal. 140;
Meriwether v. Garrett, 102 U. S. 472, at p. 515;
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Clapp v. Ely, 27 N. J. L. 622;
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By Frederick A. Henry,

Attorneys for Appellant.

FILE COPY

JAN 4 193

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 237

STATE OF OHIO EX REL.
E. H. BRYANT,
Appellant,

vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY,
F. A. SEIBERLING, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States 14

2. The Ohio Park Board Law, General Code Sections 2976-1 to 2976-10i, is repugnant to the Due Process and Equal Protection clauses of the XIV Amendment, Sec. 1, and to the guaranty concerning state government in Sec. 4, Article IV of the Federal Constitution 26

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Section 14. [Repeals.] 43

108 Ohio Laws, Part 2, Page 1097:

An Act to amend sections 2976-1 and 2976-7 of the General Code and to supplement section 2976-10c of the General Code by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i relating to park districts and providing for the annexation of territory thereto, for the sale of lands for the levying of taxes, for the issue of bonds and conferring certain police powers upon boards of park commissioners 44

Sec. 2976-1. [Park districts may be created to encourage forestry, etc.] 28, 44

Sec. 2976-7. [Acquisition of addition of lands, lakes, streams, etc.] 28, 44

[Appropriation proceedings] 45

Sec. 2976-10d. [Annexation of adjacent or contiguous territory; procedure.] 9, 45

Sec. 2976-10e. [Powers of budget commissioners in relation to districts.] 45

Sec. 2976-10f. [Sale or lease of lands not needed; notice.] 46

[Approval of probate court.] 46

Sec. 2976-10g. [By-laws, rules and regulations; violation of, a misdemeanor; penalty.] 9, 46

Sec. 2976-10h. [Powers of employes; oath.] 9, 47

Sec. 2976-10i. [Tax levy for use of district; submission of question.] [Issue of bonds.] 47

Section 2. That said original sections 2976-1 and 2976-7 of the General Code be, and the same are hereby repealed 48

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 237

STATE OF OHIO EX REL.
E. H. BRYANT,
Appellant,

vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY,
F. A. SEIBERLING, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

OFFICIAL REPORT OF OPINION BELOW.

The official report of the opinion of the Supreme Court of Ohio will be found in 120 Ohio St., 464, (advance sheets, subject to change in pagination when complete volume is issued); 166 N. E. 407 (advance sheets, No. for June 18, 1929,) and is entitled the *State ex rel. Bryant vs. Akron Metropolitan Park District for Summit County, et al.*, the *State ex rel. Wadsworth, a Taxpayer, vs. Zangerle, Auditor, et al.*, Nos. 21324 and 21336, decided March 27, 1929, and printed in the Ohio State Bar Association Reports, Volume II, No. 11, for June 11, 1929; also in the Law Bulletin and Reporter, Volume XXIX, Number for June 17, 1929, page 277. In each of these local law weeklies appears also the

report of the same court's decision in *Shook vs. Mahoning Valley Sanitary District*, 120 Ohio St., 449 (advance sheets); 166 N. E. 415 (advance sheets, No. for June 18, 1929), which was decided at the same time and involves similar constitutional questions. The opinion of the Supreme Court of Ohio in the present case appears also in the printed transcript of record at pages 20 to 39.

JURISDICTION OF THIS COURT.

Paragraph 1 of Rule 12 having already been complied with by the filing of "Appellant's Statement of Basis of Jurisdiction of this Court," which was unopposed and upon which the question of jurisdiction was submitted on October 14, and the jurisdiction sustained on October 28, 1929, a repetition here of the contents of said statement is dispensed with under Rule 27.

STATEMENT OF CASE.

The material facts in respect to the subject matter and history of this case, with references to the printed record, are set out below.

This is one of two parallel cases (see No. 238, *State of Ohio ex rel. Pauline Wadsworth, Appellant, vs. John A. Zangerle, Auditor, et al.*) which are here on appeal from the Supreme Court of Ohio. Both appellants were plaintiffs in the Common Pleas Courts. In the Courts of Appeals, the appellant in the present case, No. 237, was plaintiff in error, and in No. 238, the appellant here was appellant there. In the Supreme Court of Ohio, each was plaintiff in error. In each case the relator, a taxpayer, sued in the Court of Common Pleas of the proper county for an injunction on constitutional grounds, both State and Federal, to enjoin the Park Board of the (Cleveland or Akron) Metropolitan Park District, together with the auditor of

the county where such Board's revenues and disbursements are handled, from making further expenditures of public money, from incurring any obligation requiring such expenditures, and from the taking of other official action in behalf of the district (*i. e.*, the Akron Metropolitan Park District for Summit County in No. 237, and the Metropolitan Park District in Cleveland, Cuyahoga County, in the instant case, No. 238); for a decree declaring the Ohio Park District Act unconstitutional; and for other specific and general equitable relief. In Ohio it is settled by *Green vs. The State Civil Service Commission, et al.*, 90 Ohio St., 252, that a taxpayer may maintain such an action for injunction against a public commission, board or officer.

Both Districts were organized under the Ohio Park District Act, General Code Sections 2976-1 *et seq.* The original act, with amendments, is herein set out in Appendix A. The Akron District comprises all of Summit County except the Township of Twinsburg and the Village of Hudson. The Cleveland District originally comprised all of Cuyahoga County except Bay Village (R. 44); but with subsequent annexations it now (R. 44, 54) embraces the whole of Cuyahoga County together with the Township of Hinckley in Medina County (R. 42), and it has furthermore acquired and holds land in Lake County which is not annexed to but lies outside of the District (R. 42, 54).

The mode of organization of park districts prescribed by the Act contemplates the presentation to the probate judge of a freeholder's petition for and a map of the proposed district, indicating the name and boundaries thereof, which district shall not divide any township or municipal corporation. After notice and hearing, such judge shall, with or without diminishing or altering, but without enlarging, the suggested boundaries, enter an order creating such district, provided he shall find the proceedings regular and that "the creation of such district will be

conducive of the general welfare"; and shall then appoint three park commissioners, who are empowered by the Act to levy taxes, define misdemeanors, appoint police officers, etc. In each of these cases such characteristic features of the Park Board Laws are charged to contravene the Constitutions both of Ohio and of the United States,—the federal aspects of such averments in the present case, No. 237, being cited and discussed below.

The lower state courts decided both cases for the defendants, but in each the Ohio Supreme Court divided, two for and five against the constitutionality of the Act (R. 7). Under the peculiar provisions of Section 2 of Article IV of the Ohio Constitution, hereinafter quoted, the minority opinion controlled the court's decision whereby the judgments of the lower courts in both cases were affirmed. As explained below, the decisions of the lower courts upon the constitutional questions were themselves controlled under the rule of *stare decisis* by the prior decision of the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* 108 Ohio St., 497, the syllabus of which (as being officially declaratory in Ohio of the adjudicated law) did not stop with passing upon the particular constitutional questions presented and considered therein, but upheld generally the constitutionality of this Park Board Act.

In the present (Akron) case, No. 237, judgment of dismissal (R. 13) was rendered in favor of the defendants, by the Court of Common Pleas of Summit County, upon the pleadings, comprising plaintiff's amended petition (R. 13-18) and the joint answer (R. 18-20) refiled thereto (R. 12, 13). Error was then prosecuted to the Court of Appeals of Summit County (R. 9). There plaintiff's motion to advance was overruled, "it appearing to the court that the issues made in said case by the pleadings are now before the Supreme Court for determination in another (the Cleveland) case pending therein which has been argued

and submitted (R. 9). But at the next term, without further awaiting such decision, the judgment below was "affirmed, there being, however, in the opinion of the court, reasonable ground for this proceeding in error." (R. 10) The cause was thence taken to the Supreme Court of Ohio by petition in error alleging *inter alia* (R. 5, 8):

> "Fifth. That said judgment denied the plaintiff in error of the protection of the constitutional provisions set forth in its petition."

There, on intimation to counsel for the Park Board during argument, the constitutional questions were further briefed, and *amici curiae* having also filed briefs on each side (R. 6), the court *sua sponte* ordered a reargument, after which the judgment of the Court of Appeals was finally affirmed (R. 6); but the affirmance being qualified by the disclosure that a majority comprising five of the seven judges considered the Act to be unconstitutional (R. 7), this appellant filed an application for a rehearing, which the court denied (R. 6, 7), and also filed and the court overruled (R. 6, 7) a motion to vacate the judgment and for judgment for plaintiff in error (R. 6), alleging *inter alia*, besides the previously urged constitutional objections (R. 16, 17) to the Park Board statutes as hereinafter discussed, a further constitutional objection then and not until then arising or available, (*cf. Saunders vs. Shaw, et al.*, 244 U. S. 317, 320), viz., that the affirmance with such majority dissent (together with the provision of Article IV, Section 2 of the Ohio Constitution purporting to warrant such procedure in some but not in all cases of such division of opinion) itself violates various paramount provisions in the Constitutions both of Ohio and of the United States (R. 40, 42); namely, as to the latter, the Equality Clause of Section 1 of the Fourteenth Amendment (R. 16), the guaranty of republican state government in Section 4 of Article IV (R. 16), and the mandate within and concerning the

instrument itself (Article VI) that it is the supreme law of the land (R. 17) and that the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Appellant's motion to vacate concluded by alleging accordingly that this recital of constitutional objections to the entering of such minority judgment sustaining the Park Board Act solely by force of said Section 2 of Article IV of the Ohio Constitution, with its capricious and unequal operation, its arbitrary and unrepublican rule of adjudication, and its silencing of the majority judges concerning the Constitution whose supremacy they are bound by its terms to declare (R. 16, 17),

> "applies not only to the determining of the repugnance of the Act to the Ohio Constitution, but *a fortiori* to the testing of such act under the Constitution of the United States which may and must be adjudicated by a majority of this Court."

That provision of the Ohio Constitution, Article IV, Section 2, which is here referred to, is as follows:

> "No law shall be held unconstitutional and void by the supreme court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The procedural history of the *Cleveland* case, No. 238, is the same as that of the instant case, No. 237, save that in the latter the Common Pleas judgment was rendered upon the pleadings and not, as in the Cleveland case, after full trial of issues of fact in respect to alleged maladministration by the Board itself; and the review in the Court of Appeals was by proceeding in error and not, as in No. 238, by appeal and trial *de novo*. In each case, in so far as the constitutional issues were concerned, the judges of the lower state courts, following the above cited previous decision of

the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* (108 O. S. 497) and therefore declaring the Park Board Act to be constitutional under the rule of *stare decisis,* could, of course, give no effect to opposing views. This in turn arbitrarily and by mere chance subjected the dissenting majority of the judges of the State Supreme Court to the distinct and different but equally compelling restraint which the Court of Appeals' judgment, sustaining the law, imposed upon their freedom of decision under the above quoted provision of the State Constitution (Article IV, Section 2). Thus, the prior action of either court appears to have constrained the action of the other. But as to the original basis of this dilemma, the opinion by Marshall, *C.J.,* expressing the views of the prevailing minority of the Supreme Court (and in this respect of the majority also), concedes that its earlier decision in *McNab vs. Board of Park Commissioners,* cited *supra,* broad as was its affirmation of the constitutionality of the Park Board Law, should not be treated as conclusive of these suits in view of the new constitutional questions therein first presented; for he says (R. 26):

> "While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made."

The arbitrary results of the operation of Section 2 of Article IV of the Ohio Constitution in making those statute laws of a general nature (which are required by Section 26 of Article II to be of uniform operation throughout the state,) constitutional and valid in some appellate districts, unconstitutional and void in other appellate districts, and of uncertain operation in all other parts of the State of Ohio, are set forth in *Board of Education vs. Columbus,* 118 Ohio St., 295, at pages 301 to 307, and are hereinafter discussed.

In addition to the constitutional question above outlined which arises out of the minority judgment rendered by the Ohio Supreme Court, and in particularizing the general averment of unconstitutionality of the original and amendatory acts comprising the Park Board Law (R. 16, 17), "all of which are contrary to the aforesaid provisions of the Constitution and the fundamental law of the land" (R. 40), the amended petition herein specially raises Federal questions (R. 14-17) on six salient features of said law which are deemed repugnant to various sections of the Federal Constitution, including *inter alia* the Due Process and the Equality Clauses (R. 16, 17) of the Fourteenth Amendment, and which may be summarized as follows, viz.:

1. Section 4 (107 Ohio Laws 65; General Code Section 2976-4) empowering the probate judge to *mold* the confines of the territory of the proposed district as petitioned for and to erect the same into a park district, "if he finds the creation of such district will be conducive to the *general welfare.*"

2. Sections 5 and 6 (107 Ohio Laws 66; G. C. 2976-5 and 2976-6) providing for the *appointment* by such judge of three persons—whose qualifications are not prescribed—to constitute the board of commissioners of such park district, as a body corporate and politic;

3. Section 7 (107 Ohio Laws 66; G. C. 2976-7) authorizing said board to appropriate lands within and without said district;

4. Sections 10 and 10i (107 Ohio Laws 67; G. C. 2976-10; and 108 Ohio Laws, Part 2, 1099) authorizing such appointed board to *levy taxes* on both real and personal property up to one-tenth mill annually without popular vote; an additional one-tenth mill annually through such period of years as the electors may authorize; and such further one-tenth mill annual levies to continue over periods of years as may be so voted at not less than yearly intervals;

5. Sections 10g and 10h (108 Ohio Laws, Part 2, 1098; G. C. 2976, 10g; and 108 Ohio Laws, Part 2, 1099; G. C. 2976, 10g) enabling such appointed board to make by-laws, rules and regulations, the violation of which shall be *misdemeanors,* and to clothe its designated employees with "all the powers of *police* officers within and *adjacent* to the lands under the control and jurisdiction of the board";

6. Sections 7 and 10d (107 Ohio Laws 66; G. C. 2976-7; and 108 Ohio Laws, Part 2, 1098; G. C. 2976-10d) authorizing the probate judge to make *annexations* to the district of lands within or *without the county* of its origin, and thus to extend over such annexed territory the exercise of the aforesaid powers therein, including the park board's acquisition by appropriation or otherwise, and the developing, improving and policing of lands *outside* of such district and within or without such county, at the cost and expense of the taxpayers *within* the district, and "in such manner as the commissioners may deem conducive to the general welfare."

Other inequalities in the operation of the Park Board Law result, if, as has occurred, a large part of the land in any existing township, school district, or other taxing subdivision, is acquired by the Board and thereby becomes exempt from taxation so as to overburden the residue; or if the budget commissioners of different counties into which a park district extends, reduce in varying degrees the rate of its unvoted tax levy.

Specifically the amended petition herein avers, in regard to the authority of the probate judge of Summit County to organize the Akron Metropolitan Park District for Summit County, that (R. 16) 107 Ohio Laws 65, and 108 Ohio Laws, Part 2, p. 1097, embody a procedure which as "legislation is illegal and void," because, (a), the Park Board Law purports to authorize such judge to fix the confines of the district, and to determine whether the creation

thereof is conducive to the general welfare, "both of which called upon the said judge to determine political questions instead of deciding judicial questions" (R. 14); (b), the Park Board Law purports to authorize such judge to appoint three commissioners who by its terms "have conferred upon them the absolute power to levy taxes within such park district in an amount not in excess of one-tenth (1/10) of a mill upon each dollar of the assessed value of the property in the aforesaid district in any one year" (R. 15), including both chattels and realty; (c), said law "delegates to said Park Board Commissioners power to pass by-laws, rules, or regulations as they may deem advisable for the preservation of good order within and adjacent to said Park District" (R. 16) and for breach of such misdemeanors empower their own employes to make arrests; and (d), because "said Act cannot be given or have uniform operation throughout Summit County nor, as required by Section 26 of Article II of the Constitution of Ohio, throughout the State; and the plaintiff and those whom he represents are, therefore, subjected to "a denial of the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution" (R. 16).

SPECIFICATION OF ASSIGNED ERRORS.

In appellant's "Assignment of Errors" (R. 3-5), and in the specification thereof contained in the "Statement of Points to be Relied on" (R. 41-43), the first and second errors of the Supreme Court of Ohio complained of are in finding and deciding (R. 3)—

> "1. That, 'it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ.) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Mar-

shall, C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed.'

"2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void,' does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to 'deny to any person within its jurisdiction the equal protection of the laws.' "

The two errors thus assigned—mention of the third and last one being deferred until later—are further specified in the "Statement of Points," filed in this Court as follows (R. 42, 43):

"Point One. The Park District Act (General Code of Ohio, Sections 2976-4 *et seq.*) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that 'No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void'; and on motion to vacate this judgment and substitute a judg-

ment of reversal pursuant to the opinion of the majority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be 'the supreme law of the land' and that 'the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding,' the Supreme Court of Ohio erred in refusing so to do.

"Point Two. This peculiarity in the judicial structure of the State of Ohio as illustrated in *Board of Education vs. Columbus,* 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things—but solely from the lottery of discordant inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because, whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV of the same instrument which assures to each state a republican form of government."

The third and last assignment of error is that the Supreme Court of Ohio erred in finding and deciding (R. 4, 5)—

"3. That the 'Park District Act' of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive (107 Ohio Laws, pages 65-69) and the amend-

ments thereto, Sections 2976-1 to 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that neither said act nor any of said sections, by delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state."

This third assigned error is further specified in the "Statement of Points," as follows (R. 44):

"Point Three. On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment, in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Section 4 of Article IV in delegating to non-elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes."

ARGUMENT.

1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States.

It is, of course, well settled that the equal protection of the laws is not denied by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress. *Bowman (Missouri) vs. Lewis,* 101 U. S. 22; *Mallett vs. North Carolina,* 181 U. S. 589. But assuming that the constitution or laws of a state may vary the remedies afforded by its courts at the discretion of the law-making power, and may even take away their right to administer generally certain kinds of remedies, the Equality Clause forbids that the state shall deny such relief to one person while granting it to another under like circumstances and in the same territorial jurisdiction. *Truax vs. Corrigan,* 257 U. S. 312, 331-5. The equality of rights is also a principle of republicanism, and although in the maintenance of such form of government the duty was originally assumed by the states where it still remains, the obligation rests upon the United States to see that the states do not deny that right. *United States vs. Cruikshank, et al.,* 92 U. S. 542, 545; U. S. Const., Art. 4, §4. Such Federal supervision is exercisable by Congress in the admission of new states. Thereafter a state enjoys wide discretion to vary in detail its frame of government. But where the innovation is contrived or necessarily operates to destroy or impair the fundamental rights of persons

within the state's jurisdiction, this guaranty, overlapped and supplemented as it is by the Due Process and Equal Protection clauses of the Fourteenth Amendment, contributes with them to form the bulwark of our liberties.

No feature of the general framework of state government throughout the United States is more constant or characteristic than the provision made in every constitution for a single reviewing court at the apex of the state's judicial structure. (See the summary of such provisions set forth in 15 *Corpus Juris* at pages 1026 to 1127.) The invaluable function of such a tribunal is to secure the unity of the unwritten law of the state and uniformity in the judicial construction of its written law. To accomplish this end without congestion, the right of review in the state supreme court is generally restricted in various ways. Perhaps the commonest mode is to refuse, or to regulate and limit, resort thereto as of right except when a constitutional question is involved or a question on which coordinate lower courts have created conflicting precedents. The revision of the Constitution of Ohio in 1912 embodied measures of this kind for the relief of the Supreme Court, but disclosed at the same time a jealous distrust of one of its main reasons for being. That Court's power to declare a law unconstitutional contrary to the judgment of the next lower court was heavily handicapped through the device of a virtual veto exercisable by a small and shifting minority of its members.

As often happens unexpectedly from a slight interference with any natural order, startling and baleful results have ensued upon this change. Uniformity of construction and consequent operation of the written law no longer prevails throughout the State of Ohio. (See *Board of Education vs. Columbus,* 118 O. S. 295, cited *supra,* and discussed below.) By force of this amendment of Article IV, Section 2, of its Constitution, that State thus denies to

those within its jurisdiction the equal protection of the laws. Such inequality is no mere incident to the normal working of a generally established system, such as judgments of affirmance consequent upon an equal division of the judges sitting. It is due rather to a deliberate experiment with an unprecedented and impracticable departure from the type of judicature which obtains in all the states of the Union with but one other exception, and which is an outstanding and durable feature of the republican form of government enjoined upon the states and guaranteed to their inhabitants.

It will be argued that the logic of this contention would require not only that every state must provide a single court of last resort, as each in fact has ever done, but also that every litigant shall have access thereto for a review of his cause, as few, if any, states now unrestrictedly permit. The answer to this objection is found in the principles of classification which are defined and limited in the three decisions of this Court above cited, viz., *Bowman (Missouri) vs. Lewis, Mallett vs. North Carolina,* and *Truax vs. Corrigan.* The Federal Constitution does not require statewide uniformity of state laws or of prescribed or permitted judicial procedure, nor forbid the adaptation thereof to diverse conditions and places. But it does demand that any classification of laws or procedure for different parts of the state, or to meet varying conditions in all parts of the state, shall have a reasonable basis and shall not be fitful or fortuitous in its application or operation. If by provision in a state constitution a supreme court is created and made accessible to litigants, its jurisdiction cannot lawfully be so molded, under pretense of classification, as to promote or probably produce contrariety of decision of identical questions. A bench may indeed change its mind, but so long as it remains of the same mind it ought not to be obliged to render contradictory judgments in respect to

the construction and application of one and the same law. Classification, moreover, is a legislative function; but in Ohio, without any exercise thereof by the General Assembly, a statute enacted by it becomes, by inconsistent adjudication under this constitutional constraint, law in one district, no-law in another, and uncertain law in the rest, with haphazard and chaotic heed paid here to the legislative will and there to applicable constitutional limitations.

Though not all this has yet happened to the Park Board Law, the minority judgment in the present case was in fact the direct result of this vice in the Ohio Constitution. Such result is peculiarly flagrant because, as explained above in the Statement, the controlling decision below by the Court of Appeals was itself determined by a prior decision of the Supreme Court, the official syllabus of which the latter Court now concedes to have been too sweeping. And the majority view of the Ohio Supreme Court now—henceforth a license and invitation for the lower courts to follow (*Board of Education vs. Columbus, supra,* citing at pp. 299-301, *Hertz vs. Woodman,* 218 U. S. 205,)—will next time become its effectual judgment. The appellant here is clearly and substantially aggrieved; the contention now presented was seasonably urged below; it is immaterial that there is as yet no conflict of decision in respect to this Act; and the proposition of law embraced in the point now argued is justiciable and not moot or premature. *State ex rel. Pogue vs. Groom,* 91 O. S., 1, and p. 8 of the opinion by Donahue, J., (afterwards a judge of the U. S. C. C., 6th Circ.); 12 C. J. 786, note 78.

The anomaly of this provision of the Constitution of Ohio, which defeats the majority opinions of the judges of its Supreme Court, as well as the flagrant inequality of its operation, will best be explained by quoting excerpts from the opinion in *Board of Education vs. Columbus,* 118 Ohio St., 295 (cited *supra*), wherein that Court for the second

time passed upon the constitutionality of Section 3963 of the General Code of that State, requiring that "no charge shall be made by a city or village, or by the water works department thereof, for supplying water for * * * the use of the public school buildings in such city or village." In the opinion by Marshall, *C.J.*, (who delivered the prevailing minority opinion in the present case, and with whom then as now Kinkade, *J.*, concurred,) he says, at page 296:

> "The controversy is in every essential detail identical with the case of *City of East Cleveland vs. Board of Education of City School District of East Cleveland*, 112 Ohio St., 607, 148 N. E., 350, decided May 26, 1925. There has been no change in the personnel of this court since that decision. That decision was rendered by two members of this court; the other five judges dissenting. Two judges were able to render a judgment under authority of a provision in Section 2 of Article IV of the Ohio Constitution, which provides:
>
> " 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.' "

Again at page 306 the Chief Justice further says that

> "a cause originating in the probate court might involve the constitutionality of a statute, and the statute might be declared unconstitutional by the probate court, the Common Pleas Court on error, and by one of the judges of the Court of Appeals, and by five judges of the Supreme Court, a total of eight judges, and yet the statute would be held to be constitutional by the concurrence of two judges of the Court of Appeals, declaring its constitutionality, and affirmed by two judges of the Supreme Court, a total of four."

The unequal operation of the laws of the State of Ohio in the application of this provision of the Constitution of Ohio is clearly disclosed at page 298 of the opinion:

"It has always been recognized as a sound theory that the most important function of courts of last resort is to render uniform the conflicting decisions of inferior tribunals within the jurisdiction of such courts, but the practical operation of this theory is destroyed in the State of Ohio, so far as the constitutionality of statutes and ordinances is concerned, by the constitutional provisions above referred to. The best possible illustration of that fact is found in the decision of the instant case and the decision of the *East Cleveland* case. In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court. It would be difficult to describe or even imagine a more deplorable situation."

We respectfully request this Court to read the entire opinion in the above case.

The rule of *Missouri vs. Lewis, supra,* and of *Mallett vs. North Carolina, supra,* is to be distinguished from the principle applicable to the present case, in that the diversity of provisions for judicial review in different parts of a state may presumably be warranted by the existence of a basis of reasonable geographical classification. Here, however, there is neither geographical nor other legitimate ground of classification to sustain the eccentric and irrational operation of Section 2 of Article IV of the Ohio Constitution.

Certainly the determination of the Federal as distinguished from the State Constitutional questions concerning the validity of the Park Board Law by a minority vote of the members of the Supreme Court of Ohio, pursuant to said section, brings such section into direct conflict with Article VI of the Federal Constitution which provides that that instrument and the treaties and laws made under it are the supreme law of the land, and commands that "the *judges* of every state shall be bound thereby, anything in the *constitution* or laws of any state to the contrary notwithstanding." Fortunately this Court can independently reconsider those questions. Not generally so, however, of questions arising under the State Constitution alone. Of these the State Supreme Court is, in general, and when permitted to function effectively, the final arbiter. But since that tribunal's discharge of this function is controlled by the minority-rule limitation in the State Constitution, such limitation, being incompatible with the Equal Protection Clause, must give way and the judgment below be reversed.

In *Railroad Co. vs. Commissioners,* 1 Ohio St., 77, at page 81 it is said:

> "that it is the right, and consequently the duty, of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the Constitution of the United States or of this State, and if so found, to treat it as a nullity."

It is also provided in the Constitution of Ohio, Article I, Section 16, that

> "all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of the law and justice administered without denial or delay."

And in Section 2 of Article IV, it is provided that the Supreme Court of Ohio

> "shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and

appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state * * *."

Such provisions must either wholly nullify, or else yield to, the later clause in the same Section 2 that is here complained of. Thus the enforcement of the latter defeats Section 26 of Article II, which requires that "all laws of a general nature shall have a uniform operation throughout the State." These self-contradictions in the Ohio Constitution are exemplified and discussed in *Board of Education v. Columbus, supra,* wherein the Court concludes that it is itself impotent to correct them against the adverse vote of any two of its members.

But assuming that all these irreconcilable provisions are alike binding upon all the judges of that Court, the mischief-making limitation is the one that should yield. If a key to the deadlock can not be found in the State Constitution, one lies at hand in that of the United States. This solution was duly invoked in the court below, and it erred in failing to enforce, by majority rule, the protection claimed under that instrument—by which "the judges in every state shall be bound," "anything in the Constitution or laws of any state to the contrary notwithstanding,"—and in failing to hold void this clause in the Constitution of Ohio, which is not only the negation of due process and a denial of equal protection, but when engrafted on the frame of any government is destructive of its republican form.

A striking parallel to such application of these basic limitations on the power of a state thus to hobble its supreme judges is found in the commentary of a learned historian of this Court upon an abortive proposal of the same device a century ago to paralyze Your Honors' power to declare state laws repugnant to the Federal Constitution. In the decade 1823 to 1833 while Congress was debating various measures to restrict or nullify the power of the

United States Supreme Court to hold a state law repugnant to the Federal Constitution, one of the means to that end, proposed in 1824 and again in 1829, is described in Warren's "The Supreme Court in United States History" at pages 124-6 (and see also pp. 177-8) as follows, including footnotes:

> "Since many persons in the country believed that strong arguments could be made in behalf of such a measure, a bill was reported from the Committee on Judiciary by Senator Martin Van Buren of New York, on March 11, 1824, providing that no law of any of the States should be rendered invalid without the concurrence of five of the seven Judges. The bill, however, was laid upon the table. In the House, similar measures were proposed by Robert P. Letcher and Thomas Metcalfe, both of Kentucky. That this reform in the Judiciary system seemed, superficially, to have much to commend it is seen from the fact that Webster wrote to Judge Story, informing him that Judge Todd had told him it would give great satisfaction in the West, and asking him if he saw any evil in such a provision. Later, however, Webster decided to oppose the change, although he was willing to go so far as to offer a substitute to provide that, in cases involving the validity of a State statute or Constitution, 'no judgment shall be pronounced or rendered until a majority of all the Justices of the said Court legally competent to sit in the cause shall concur in the opinion, either in favor of or against the validity thereof, and until such concurrence such suit shall be continued.' There were two very vital objections to this requirement of a concurrence of five of the seven Judges, which seem to have been entirely overlooked in the debate. In the first place, it would have worked with singular injustice upon litigants in the Federal Circuit Courts; for, while an appeal to the Supreme Court from a State Court decision was only possible in a case where the latter had held a State law constitutional, an appeal from a Circuit Court decision was possible, even if that Court

held the State law invalid. An appellant in the Supreme Court in the latter case would find himself in this predicament: if five out of seven Judges concurred in finding the State law invalid, he would lose his appeal; and if only four concurred, the proposed statute would prohibit the Supreme Court from finding the law invalid; hence the decision of the Circuit Court as to invalidity would become final; so that the appellant would lose in either case, and the proposed statute would be of no avail to him. But the fundamental objection to the proposition was that it completely ignored the true function of a judicial tribunal, which was, to hold the scales of justice even and to decide impartially between the parties, the appellant and the appellee both meeting before it on even terms. The proposed statute entirely lost sight of the fact that suits in the Supreme Court involving the validity of State statutes were litigation between individuals and presented questions of the property or personal rights of individuals, and that each litigant was entitled to equal protection. These suits were not impersonal attempts to adjudicate between the Constitution, or the Federal Government, and the State; they were simply adjustment of the respective rights of two persons, one claiming a right under the Constitution, the other under the State law. A Federal statute, therefore, which required an appellant to persuade five out of seven Judges, in order to win, while the appellee in order to prevail had to persuade but three Judges, gave to the appellee in a lawsuit very heavy odds. The parties no longer came into the Court on an equal basis, but with the chances heavily weighted against an appellant—and this was not in consonance with any Anglo-Saxon system of justice."

Thus any court that has jurisdiction to hear, but is unable, except in form, to decide a particular case unless six-sevenths of its membership concur, is not "open to every person," and is unable "to administer justice without denial or delay by due course of law."

Manifestly, too, this restriction upon the Ohio Supreme Court gives to those who there seek to have a law held constitutional, after the Court of Appeals has held it unconstitutional, an advantage over those seeking to procure the reversal of a decision of the Court of Appeals holding a law constitutional; the effect being that in one case the party is defeated unless all but one member of the Supreme Court concur in sustaining his contention, while in the other a majority controls and he prevails. When parties are unable to approach a court upon an equality, equal protection of the laws is manifestly denied to them. It may be unnecessary that any such right of review in the Supreme Court of Ohio should be provided at all so far as the Federal Constitution is concerned. But having been provided by the Constitution of that State as a matter of right in all cases involving constitutional questions, it must be accorded impartially so as to afford the equal protection of equal laws not in form only, but in substance and in fact, and always. In various pronouncements, the judges of that Court are all committed to the proposition that this restriction operates in practice directly contrary to these principles, both upon litigants and upon the laws. The Court erred in not holding accordingly that it contravenes the Equality clause and is hence of no effect.

Judged thus, as it must be, by the actual results of its operation, and viewed in any aspect and from every standpoint, this clause of Section 2 of Article IV of the Constitution of Ohio, rests upon an irrational basis of attempted classification, is repugnant to those provisions of the Federal Constitution which are now invoked to render it inoperative, and is therefore null and void.

In *Green v. Red Cross Medical Service Company,* 232 Ill. 616, at page 619, the opinion of the court, by Cartwright, *J.*, declares:

"We are asked to review the finding of the Appellate Court as to the fact found and incorporated in the judgment of that court by virtue of the provision of section 120 of the Practice Act, which provides that if the Appellate Court shall reverse a judgment of the trial court as the result of finding the facts different from the finding of the trial court, and does not remand the cause, both the facts and law shall stand for review in this court. We have held that provision to be a violation of the constitution, as conferring upon one party to a litigation a special privilege not enjoyed by the other party, and as denying to the party whose rights are limited on the appeal, and who has no right to have the facts reviewed in case they are held against him by the Appellate Court, the equal protection of the laws. *Hecker v. Illinois Central Railroad Co.*, 231 Ill. 574; *Jones v. Chicago, Rock Island and Pacific Railroad Co.*, id. 302."

In the *(Jones)* case last cited, the holding therein is distinguished at p. 319 from that in *Chicago and Alton Railroad Co. v. Fisher,* 141 Ill. 614, where it was "decided that the legislature might properly determine in what class of cases the judgment of the Appellate Court should be final, excepting, of course, the four classes of cases in which an appeal from the Appellate Court to this Court is guaranteed by the constitution."

And in the other *(Hecker)* case, it is held (syl. 3):

"The legislature has power to regulate appeals and writs of error, but it has no right to discriminate between the parties and allow an appeal to one party from an adverse decision and not allow it *upon equal terms* to the other." (Italics ours)

The scope of the doctrine of classification is also discussed at pp. 578-9, with citations of illustrative decisions from different jurisdictions, including *Sanitary District v. Bernstein,* 175 Ill. 215, where the court said:

"Every citizen has an equal right with every other to resort to the courts of justice for the settle-

ment and enforcement of his rights, and it is true that a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law."

See also:

Funkhouser v. Randolph, 287 Ill. 94;
Arizona Eastern R. R. Co. v. Head, 26 Ariz. 259, syl. 4;
Clapp v. Ely, 27 N. J. L. 555, 620-1, 622-4.

2. The Ohio Park Board Law, General Code Sections 2976-1 to 2976-10i, is repugnant to the Due Process and Equal Protection clauses of the XIV Amendment, Sec. 1, and to the guaranty concerning state government in Sec. 4, Article IV of the Federal Constitution,—

(A) *in delegating the legislative power to the probate judge of a county (a) to create upon the application of self-constituted petitioners, a park district on finding it "conducive to the general welfare"; (b) to mold its boundaries at his (limited) discretion; (c) to create a board of three park commissioners, with no limitation as to citizenship, residence, or other qualification, and deriving their office from his appointment and not by election, for the exercise at their discretion of important powers of government within and beyond such district; and (d) to create, on further petitions, by subsequent annexations, an indefinite expansion of such district within and beyond the county and through any number of counties,—jurisdiction for the latter purpose, when found to be "conducive to the general welfare," being in the probate judge of the county in which such annexed territory lies;*

(B) *in delegating to such non-elected park commissioners the legislative power (a) to define misdemeanors within and adjacent to such district, and within and adjacent to any territory acquired outside thereof, and to*

clothe their agents with power to make arrests in all such places; (b) to levy, at discretion within a maximum limit, upon all personal and real property within such district, general taxes, which in no sense purport to be imposed or apportioned according to benefits; (c) to acquire lands without as well as within such district; (d) to exercise therefor the power of eminent domain; (e) to visit the cost of acquiring lands without such district upon the taxpayers within it; and (f) to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare"; and

(C) *in burdening the taxpayers of the district unequally in sundry ways.*

Unlike *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, and other similar decisions of this Court, this suit involves a kind of district which is formed for a public purpose more general and indefinite than the construction and maintenance of one or more local public improvements for the special benefit of the lands or inhabitants of the included areas. The legislature in enacting the Park Board Law defined no fixed or determinate undertaking to be accomplished by the exercise of prescribed powers and through agents clothed with appropriate administrative authority limited to that end. The Law is merely an enabling act—not mandatory but permissive.

The "Conservation" Amendment of 1912 to the Ohio Constitution provides (Art. II, Sec. 36):

> "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also to pro-

vide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, measuring and marketing coal, oil, gas and all other minerals."

The Park Districts Act provides (G. C. Sec. 2976-1):

"In order to encourage forestry, to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. * * *"

The same Act further provides (G. C. Sec. 2976-7):

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. * * *"

The language of the Act thus paraphrases Article II, Section 2 of the State Constitution. The purpose defined in that section is a state purpose—"for converting into forest reserves lands forfeited to the state," the "acquiring of other lands for that purpose," and the "conservation of the natural resources of the state." But the Act in the last clause above quoted goes on to particularize means for realizing the purpose of the conservation section of the Constitution. It is avowedly "to those ends" and "in order to" those purposes that the law is enacted. In Ohio a state purpose must be effected at state expense. The cost of a state institution or state improvement must be defrayed by the state and cannot be laid upon the taxpayers

locally. *Wasson, et al. v. Commissioners,* 49 Ohio St. 622. Therefore in order to sustain the constitutionality of the Park Districts Act, which provides for casting the entire burden of cost upon the taxpayers within the district, the *park* purpose is singled out by the Ohio Supreme Court and likened to that of city parks, so as to make it a proper subject of local taxation and of district government. The park districts created under this act are not, however, in any sense municipal corporations or ancillary thereto; neither are they of that familiar type of special district which is formed at the instance of those whose lands will be benefited for the purpose of making or constructing a particular local improvement such as, for example, an irrigation or a reclamation or a flood control project that is undertaken for the special benefit of the included territory. The design of the Conservation Amendment was not to produce any special enhancement of the value or usefulness of surrounding property through the acquiring by the public of submerged or swamp or forest lands and other natural resources of the state and the developing and preserving of the same as forest or other reserves for the general welfare. Nor does the Park Districts Act provide for special benefit improvements or those which serve a particular local interest or add to the value of included or environing lands. The Act discloses no suggestion of this sort. The taxes authorized to be levied by the Park Commissioners are not required to be based on the cost of a prescribed improvement or project or to be levied at a rate prescribed by the legislature or mathematically resulting from criteria prescribed by it. Neither do they purport to be special assessments laid according to actual or presumed benefits. The Act does not admit of any such construction.

We have then the case of a taxing district, the formation of which and the exercise of powers granted to its

commissioners are conditioned upon findings, not made by the legislature but required by it to be made by others, upon the question whether such actions will be "conducive to the general welfare."

Without here attempting to gainsay that this Court, on appeal from a state court of last resort, will not review the decision of any issue which the latter tribunal by its judgment has made to turn upon the law of such state as an independent ground adequate to sustain such judgment, and without now disputing that the Federal Constitution does not forbid the states to delegate their legislative power if thereby the rights of individuals guaranteed by that instrument are not thereby infringed—an "if" that begs the question—there yet remains for the decision of this Court the question *inter alia* whether the Park Districts Act embodies such a delegation of legislative power as to invade the rights so guaranteed.

Returning now to the scrutiny of the Act itself, it will be observed that no duties are enjoined upon the Park Board Commissioners. They may remain entirely inactive. If, however, they choose to act, the field of action is so inclusive that their discretion may properly be said to be limited only by their revenues. And for raising revenue, their discretionary power of general taxation in this populous Park District is very large. They may acquire lands where they please, within or without the district, and may improve them as they think fit. They are really answerable to no one. True, the probate court may, on hearing, remove and replace them, or, on expiration of their terms, appoint others. But he cannot instruct or compel them to pursue any policy or to accomplish any purpose. And once created, the district lives on forever. The probate judge is obliged to create a district on proper petition, provided only he finds its creation will be "conducive to the general welfare." The commissioners, when appointed by

him, may acquire lands, and thereupon they may "develop, improve and protect them as they may deem conducive to to the general welfare."

But the determination of what is "conducive to the general welfare," is clearly a legislative function. The General Assembly of Ohio has thus abdicated its office and function *pro tanto* by delegating to the probate judge and to his appointees the determination of these questions of purely legislative policy. Five of the seven judges of the Supreme Court of Ohio have said in this case that the Park Board Law is unconstitutional. Can it be properly objected that this Court has not the jurisdiction to correct a state's form of government?

The answer is two-fold; first, as the Act was charged to be repugnant to both State and Federal Constitutions, it will be presumed that the five judges deemed it unconstitutional as to both; secondly, that this appellant, suing as she has the right and authority to do in the name of the State of Ohio on her relation as a taxpayer, invokes the guaranty in U. S. Constitution, Section 4, Article IV, of a republican form of government for that state, since its governmental power is being otherwise exercised upon her as such taxpayer. True, this Court has perhaps never answered the first branch of the query, which the opinion in *Michigan Central Railroad Company v. Powers*, 201 U. S. 245, propounds, viz.:

> "Suppose a State by its constitution grants legislative functions to the executive or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process or equal protection?"

Precisely these results, however, do follow upon the more searching point now pressed. Here the offense comes,

not indeed by any grant in the constitution of a state, but by act of its legislature delegating to probate judges its law-making functions of forming park districts if and when they find them "conducive to the general welfare," and delegating to park commissioners appointed by such judges its legislative power to find generally what they shall do that will be "conducive to the general welfare," and specifically conferring upon them the powers to fix tax rates and make levies, to appropriate lands, to frame penal laws, and to create a constabulary. It is surely not a judicial function to determine whether "the creation of such district will be conducive of the general welfare" and to hinge the erection of a new kind of political subdivision of the state upon such finding (G. C. Sec. 2976-4). Nor at least to *appointed* commissioners of such district can *discretion* be lawfully granted to create a policy and program for such district, to take property by eminent domain, to tax those who do not consent to be taxed, and to inculpate and arrest offenders against the edicts of such non-elective board. Security of persons and property from political invasion of the fundamental rights pertaining thereto is the essence of republican government, of due process, and of equal protection of the laws. The power to define what is conducive to the general welfare, the power to appropriate, the power to tax, and the power to define punishable offenses, belong exclusively to the legislative branch of the government—to the general assembly or (by the initiative and referendum) the suffrage of the state; or, where such powers as that of local taxation are vested in subdivisions of the state, to the people thereof or their elected representatives, as in municipal corporations, counties and townships, and other similar districts created in Ohio for special purposes, as well as school districts. Assessments according to benefits are distinguishable and may, of course, be laid according to rules prescribed by

law. But in levying general taxes or defining any legislative policy, the responsibility of those who thus exercise power to those on whom it is exercised, constitutes, through the employment of the elective franchise, the only effective guaranty against the abuse of such power.

It is not contended that, so far as the Federal Constitution is concerned, a state may not clothe administrative officers with power to make and enforce regulations (and perhaps even to raise revenues by taxation) in so far as may be necessary and convenient to accomplish objects specifically defined and required by its laws; as where a statute prescribes an automatic mode of determining the rate of tax which it commands to be levied. But it is contended that, to accomplish undefined and permissive purposes or ends, a state may not empower its non-elected agents to determine what vague policies are "conducive to the general welfare," and when they are so determined to pursue them by such discretionary administrative means. If a state undertakes to govern in that manner, its taxpayers or citizens subjected to such form of rule, may surely invoke in its and their behalf the protection and guaranty of Section 4 of Article IV.

The power of taxation is peculiarly and preeminently a legislative power, and one which the legislature cannot delegate, except by specific authority conferred upon it by the Constitution. *Cincinnati v. Roettinger*, 105 O. S. 145, 154; *C. W. & Z. Ry. v. Commissioners*, 1 O. S. 77, 87, opinion by Ranney, *J.*

"The power to vote taxes or assessments must rest in the hands of those liable to pay them." *Campbell v. Park*, 32 O. S. 544, 560. "Taxes being a grant of the people who are taxed, the grant should be made by the immediate representatives of the people." *State v. Toledo*, 48 O. S. 112, 131, 132, 133-4. "The power to tax is one of the highest attributes of sovereignty. * * * Being a sovereign

power, it can only be exercised by the General Assembly, when delegated by the people in the fundamental law." *Mays v. Cincinnati*, 1 O. S. 269, 273. "The power of taxation is one of the sovereign powers of the state; it can only be exercised through the legislature." *Mechanics etc. Bank v. Debolt*, 1 O. S. 591, 600.

The basic principle of free institutions which forbids the delegation of the taxing power, or vesting it in non-elective boards, is generally applied in the other states of the Union. In *City of Little Rock v. Board of Improvements*, 42 Ark. 152, the peculiar provisions of the state constitution were held to authorize the delegation to and exercise by an appointive board of improvement of a city (a municipal corporation suggests *imperium in imperio*) the power to levy *assessments;* yet the general principle is conceded as follows (p. 160):

> "It is certainly true that the power of taxation is a sovereign power, which as a general rule, must be exercised by the legislature of the state; and, even in the absence of express constitutional prohibitions can not be delegated. The principle is considered to underlie all constitutions, as one of those which are taken for granted in all free governments; and so pervade the constitutions that their expression is not deemed essential."

In *Reelfoot Lake Levee District v. Dawson*, 97 Tenn. 151, 34 L. R. A. 725, the court says at page 732:

> "The particular feature of the act that is most objectionable as a delegation of the taxing power is that in which the levee district is authorized to decide for itself what rate of taxation, if any, shall be laid annually, only the maximum rate being prescribed. The legislature, before passing the law, should have determined at least three things: (1) that the purpose in view was a proper purpose for taxation; (2) the annual rate required for the present; and (3) the

rule under which it should be levied. These matters are within the legislative function, and cannot be delegated, in the absence of express authority of the fundamental law. Such questions may be left to counties and incorporated towns, in respect to their own taxes, and within proper limitations; but that is so because the general assembly is expressly empowered to grant them that authority. No other agency or instrumentality of the government can be given such power."

The following are cases applying this rule to facts not unlike those here involved.

Board of Park Commissioners v. Detroit, 28 Mich. 228;
Vallelly v. Board of Park Commissioners, 16 N. D. 25;
Parks v. Board of Commissioners, 61 Fed. 436;
Waterhouse v. Public School, 8 Heisk, 857;
State ex rel. Howe v. Des Moines, 103 Ia. 76;
Schultes v. Eberley, 82 Ala. 242;
State of Montana, ex rel., v. Edwards, 42 Mont. 135.

Citations of like sort could be extended indefinitely. For example, *The Inhabitants of the Township of Barnards v. Allen*, 61 N. J. L. 228, at pages 230, *et seq.*, is a case where the right of taxation is exhaustively considered and traced historically through the long struggle in England to our own birth of freedom. And see also:

Gautier v. Ditmar, 204 N. Y. 20, 26;
State (Lydecker) v. Drainage etc. Commissioners, 41 N. J. L. 154, 156-7.

The delegation of other legislative powers in the formation of special tax districts is condemned, and a statute so offending was held void in the decision (cited also in *Truax v. Corrigan*, to the other point in this case) of *Funkhouser, et al. v. Randolph, et al.*, 287 Ill. 94.

The following are extracts from pages 104 and 105 of the opinion:

> " 'If, after being sufficiently advised and informed in the premises, the court finds that Little Wabash River Drainage District *should be* organized for the purpose of improving said river', (a purely legislative question,) it shall be so ordered, and said findings and judgment are to be final and not questioned in any collateral proceeding."
>
> "What ought to be the boundaries of a special drainage district or what lands ought or should be organized into such a drainage district for drainage purposes is a legislative question and one that cannot be legally determined by a court."
>
> "Unilateral restrictions of this character on the right of review are repugnant to the constitutional provisions guaranteeing every person equal protection of the law. Every citizen has a right, under such guaranties, to insist that his rights of life, liberty and property shall be determined by the same rules which settle and determine similar rights of others."
>
> "The act is void for another reason. It fails to provide for the election of the corporate authorities of such district or their appointment in some mode to which the people of the district have given their assent."

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

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APPENDIX A.

107 Ohio Laws, Page 65.

AN ACT

To provide for the conservation of natural resources by the creation, development and improvement of park districts, and to repeal sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

[*Park districts may be created; boundaries thereof.*]

SECTION 1. [*Section 2976-1.*] In order to provide for the preservation of natural resources, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within any county, and the boundaries thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Application to probate judge; contents.*]

SECTION 2. [*Section 2976-2.*] Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district. Such application shall state the name of the proposed district, shall contain an accurate description of the territory to be included, and shall be accompanied with an accurate map or plat thereof.

[*Time of hearing; notice by publication.*]

SECTION 3. [*Section 2976-3.*] Upon the filing of such application the probate judge shall fix a time for the hearing of such application which shall not be less than twenty or more than forty days subsequent to the date of the filing of the application, and shall cause notice of the filing of

such application and the date of hearing thereof to be published in two newspapers of general circulation within such district, if such there be; otherwise such notice shall be published in one newspaper, and if there is no newspaper of general circulation within such proposed district, then he shall cause such notice to be posted in five of the most public places within such proposed district. Such notice shall be published, or posted, for a period of not less than fifteen days prior to the date fixed for the hearing. The hearing may be adjourned from time to time upon good cause shown.

[*Evidence, argument, judgment.*
Territorial limits may be changed at hearing.]

SECTION 4. [*Section 2976-4.*] At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application. The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality.

[*Appointment of commissioners; term, oath, bond.*]

SECTION 5. [*Section 2976-5.*] Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years. Before entering upon the performance of his duties, each commissioner shall take an oath to faithfully perform

the duties of his office, and shall give bond for the faithful performance of the duties of his office in the sum of five thousand dollars. Such bond shall be approved by and filed in the office of the county auditor. Such commissioners shall serve without compensation, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

[*Board a body corporate; employment of secretary; records.*]

SECTION 6. [*Section 2976-6.*] Such commissioners shall constitute the board of park commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and of being sued as in this act provided. Such board may employ a secretary and such other employees as may be necessary in the performance of the powers herein conferred, and shall keep an accurate and permanent record of all its proceedings.

[*Powers and duties of board. Appropriation proceedings, how instituted.*]

SECTION 7. [*Section 2976-7.*] Such board shall have power to acquire lands within such district for the conservation of the natural resources of such district, and to that end may create parkways, parks and other reservations of land, and develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation. In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations insofar as such proceedings are applicable. Either the fee or a lesser interest in the lands may be acquired, as the board may deem advisable.

[*Agreement with other public authorities in control and improvement.*]

SECTION 8. [*Section 2976-8.*] Said board may also, by agreement with the council or other public authority in control of parks or park lands within any municipality in the

district, assume control of all or a portion of any existing parks or park lands within such municipality; and in such event, such parks or park lands may be developed, improved and protected as in case of lands otherwise acquired by said board; provided, however, that nothing herein shall authorize said board to acquire or control any park, park lands, parkways, play grounds, other lands or boulevards owned or controlled by any other public authority except by agreement as above provided.

[*Cost of improvement, how assessed and collected.*]

SECTION 9. [*Section 2976-9.*] In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in excess of fifty per cent of such total cost, upon abutting, contiguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable.

[*Tax levy; power to borrow in anticipation of collection.*]

SECTION 10. [*Section 2976-10.*] Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate,

and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy, which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill.

[*Unexpended balances transferred and available; books, records, surveys, etc.*]

SECTION 11. [*Section 2976-10a.*] All unexpended balances of funds heretofore levied, or collected, under the provisions of section 2976-4 of the General Code, shall be transferred to the credit of, and shall be available for expenditure by, the board herein provided for, to the extent that such funds shall have been collected from territory included within such park district. Any balance of such fund not so collected, shall be transferred to the general fund of the county. All records, surveys and other property or information acquired pursuant to the provisions of section 2976-2 to section 2976-10 of the General Code shall also be delivered to, and become the property of said board, to the extent that they relate to lands within such district. If such records, surveys, other property and information were acquired with funds produced in part from tax levies upon property located outside said district, the amount of such funds shall be ascertained and paid by said board into the county treasury to the credit of the general fund of the county.

[*Funds shall be kept in depositories; county treasurer and auditor ex-officio officers; duties.*]

SECTION 12. [*Section 2976-10b.*] All funds under the control of said board shall be kept in depositories selected in the manner provided for the deposit of county funds, insofar as such proceedings are applicable, and such deposits shall be secured as provided in case of county funds. The treasurer of the county wherein said district is located shall be the custodian of the funds of the board and shall be an ex-officio officer of said board. He shall pay the said funds out upon the warrant of the auditor of the county wherein said district is located. The auditor of the county in which said district is located shall be an ex-officio officer of the board and no contract of said board involving the expenditure of money, shall become effective until the auditor certifies that there are funds of said board in the county treasury and otherwise unappropriated, sufficient to provide therefor. The auditor shall issue warrants to the treasurer to disburse the funds of the board upon order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe. The accounts of said board shall also be kept in the manner to be prescribed by said bureau.

[*Removal of commissioners; procedure; vacancy.*]

SECTION 13. [*Section 2976-10c.*] Each of said commissioners shall be subject to removal at the discretion of the probate judge, either upon complaint filed with such judge, or upon his own motion. No such removal shall be made, however, without giving such commissioner not less than ten days' notice and a full opportunity to be heard in his own behalf, which hearing shall be public. The order removing such commissioner shall state the reasons therefor and shall be entered upon the records of the probate court. In case of such removal, or in case of other vacancy in the office of commissioner, the vacancy shall be filled by the probate judge by appointment for the unexpired term.

[*Repeals.*]

SECTION 14. Sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code be and the same are hereby repealed.

E. J. HOPPLE,
Speaker of the House of Representatives.

EARL D. BLOOM,
President of the Senate.

Passed March 6, 1917.

The attached bill was presented to the Governor on March 7, 1917, and was not signed or returned to the house of origin within ten days after said bill was so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State March 27th, 1917.

PRICE RUSSELL,
Veto Clerk.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 27th day of March, A. D. 1917.

27G.

108 Ohio Laws, Part 2, Page 1097.

AN ACT

To amend sections 2976-1 and 2976-7 of the General Code and to supplement section 2976-10c of the General Code by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i relating to park districts and providing for the annexation of territory thereto, for the sale of lands for the levying of taxes, for the issue of bonds and conferring certain police powers upon boards of park commissioners.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2976-1 and 2976-7 of the General Code be amended to read as follows, and that section 2976-10c be supplemented by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i as follows:

[*Park districts may be created to encourage forestry, etc.*]

Sec. 2976-1. In order to encourage forestry to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within a county, and the boundary lines thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Acquisition of addition of lands, lakes, streams, etc.*]

Sec. 2976-7. Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, pathways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation.

[*Appropriation proceedings.*]

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations in so far as such proceedings are applicable. Either the fee or any lesser interest may be acquired as the board may deem advisable and the provisions of this section shall apply to districts heretofore created.

[*Annexation of adjacent or contiguous territory; procedure.*]

Sec. 2976-10d. When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows. Upon the filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality.

[*Powers of budget commissioners in relation to districts.*]

Sec. 2976-10e. In the event of the annexation to a park district of territory located in a county other than the

county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by section 2976-10 of the General Code, and the auditor and treasurer of the county in which such annexed territory is located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon county auditors and county treasurers by section 2976-10b of the General Code.

[*Sale or lease of lands not needed; notice.*]

Sec. 2976-10f. If the board of park commissioners shall find that any lands which they have acquired are not necessary for the purposes for which they were acquired by such board, they may sell and dispose of such lands upon such terms and conditions as they may deem advisable, and may also lease or permit the use of any lands for purposes not inconsistent with the purposes for which such lands were acquired, and upon such terms and conditions as they may deem advisable. Provided, however, that no lands shall be sold without first giving notice by publication once a week for four consecutive weeks in not less than two English newspapers of general circulation in such district of their intention to sell such lands. Such notice shall contain an accurate description of the lands in question and shall state the time and place at which sealed bids will be received for the purchase thereof and such lands shall not thereafter be sold at private sale for less than the best and highest bid so received without giving further notice as herein specified.

[*Approval of probate court.*]

Provided, however, that no such lands shall be sold at either public or private sale without the approval of the probate court of the county in which such lands are situated.

[*By-laws, rules and regulations; violation of, a misdemeanor; penalty.*]

Sec. 2976-10g. The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of

land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever, violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding one hundred dollars ($100) for the first offense and not exceeding five hundred dollars ($500) for a second or further offense. All fines collected for any such violation shall be paid into the treasury of such park board.

[*Powers of employes; oath.*]

Sec. 2976-10h. Such employes as the board of park commissioners may designate for that purpose shall have and may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of such board. Provided, however, that before exercising such powers, such employes shall take oath, and give bond to the state of Ohio in such sum as the board shall prescribe, for the proper performance of their duties in such respect.

[*Tax levy for use of district; submission of question.*]
[*Issue of bonds.*]

Sec. 2976-10i. Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition

to the taxes authorized by section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further that the amount of bonds so issued and outstanding at any time shall not exceed one per cent. of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent. per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the industrial commission of Ohio as provided by law.

SECTION 2. That said original sections 2976-1 and 2976-7 of the General Code be, and the same are hereby repealed.

CARL R. KIMBALL,
Speaker of the House of Representatives.

CLARENCE J. BROWN,
President of the Senate.

Passed April 9, 1919.

Passed in the house of representatives notwithstanding the objections of the Governor, January 15, 1920.

CARL R. KIMBALL,
Speaker of the House of Representatives.

Passed in the senate notwithstanding the objections of the Governor, January 15, 1920.

CLARENCE J. BROWN,
President of the Senate.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 16th day of January, A. D. 1920.

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Appellant in Nos. 237 and 238 cites the following additional cases on the jurisdiction of this Court which have recently come to counsel's attention and a copy of which has been handed this 26th of February, 1930, to appellee:

Bryant *v.* Zimmerman, 278 U. S. 63.

Roby *v.* Colehaur, 146 U. S. 153, 160.

Gulf & Ship Island R. R. Co. *v.* Hewes, 183 U. S. 66, 68.

Rector *v.* City Deposit Bank Co., 200 U. S. 405, 412.

Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 182.

Consolidated Turnpike Co. *v.* Norfolk, etc., Ry. Co., 228 U. S. 326, 334-5.

Seaboard Air Line R. R. Co. *v.* Duval, 225, U. S. 447, 481.

Louisville Nashville R. R. Co. *v.* Smith, 204, U. S. 551, 561.

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In the Supreme Court of the United States

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BRIEF FOR APPELLEES.

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WILLIAM A. SPENCER,
Attorneys for Appellees.

THE GAYLE LEGAL PUBLISHING CO., CLEVELAND, O.

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JACOB MONG, COUNTY AUDITOR,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF FOR APPELLEES.

PREFACE.

The issues presented, and points to be argued in this case are the same as those in the case of *State of Ohio, ex rel. Pauline Wadsworth, appellant vs. John A. Zangerle, Auditor of Cuyahoga County, appellee,* being the next succeeding case on the docket of this Court for the 1929 term and bearing No. 238.

The following brief has been prepared in collaboration with counsel in that case and has been changed only in recitals of fact as required by the record.

STATEMENT.

This is a proceeding on appeal from a decision of the Supreme Court of the State of Ohio, and involves the alleged unconstitutionality of certain Acts of the Legislature of the State of Ohio, by virtue of which the Metropolitan Park District in Akron, Ohio, was created, and further challenges the validity of a certain provision of the Constitution of the State of Ohio, in relation to matters of procedure of the Supreme Court of that State.

Jurisdiction of the Supreme Court of the United States is sought, under favor of U. S. Code, Title 28, Section 237, as modified by Section 861-A, (Act of January 31, 1928, Chapter 14, 45 Statutes, 54), and Section 861-B, (Act of April 26, 1928, Chapter 440, 45 Statutes, 466, U. S. C. Title 28, Sec. 344), upon the asserted claim that the suit is one wherein a title, right, privilege or immunity is specially set up or claimed under the Constitution.

HISTORY OF LITIGATION.

On December 29th, 1926, the Appellant as Plaintiff, filed his action in the Court of Common Pleas of Summit County, Ohio, seeking to enjoin the Board of Park Commissioners of the Akron Metropolitan Park District and Jacob Mong, County Auditor, from levying and collecting taxes, then in process of being levied. The appellant, as a taxpayer, asks that the collection of taxes be enjoined on the ground that the statutes of Ohio, by virtue of which the Park Board was created, were invalid in that they were in contravention of certain provisions of the Constitution of the State of Ohio.

Issues were joined on the amended petition and the answer thereto. On hearing, a decree was entered dismissing the petition. Plaintiff carried the cause, on error, to the Court of Appeals of the Ninth Judicial District,

where the decree of the lower court was affirmed. Thereafter error proceedings were prosecuted by plaintiff to the Supreme Court of the State of Ohio, as a matter of right, upon the theory that the case involved the constitutionality of certain statutes. A hearing in that court resulted in an affirmance of the judgment of the Court of Appeals.

The affirmance was effected by two of the seven judges of the Supreme Court of Ohio, and by virtue of Section 2, Art. 4 of the Constitution of Ohio providing that all of the judges of the Supreme Court except one must concur in order to hold a statute unconstitutional, except in the affirmance of a judgment of the Court of Appeals holding the statute unconstitutional. Five judges refused to concur.

After the judgment of affirmance was entered in the Supreme Court a motion was filed by plaintiff asking for the vacation of the judgment as entered and that judgment be entered according to the opinion of the five judges who refused to concur. This motion was overruled without the dissent of any judge.

This appeal is prosecuted upon the theory that there have been drawn in question, in the highest court in the State of Ohio, certain statutes, as being in conflict with provisions of the Constitution of the United States, and that the Court of the state held in favor of their validity. Further the appeal is apparently prosecuted on the theory that plaintiff has been denied a right, privilege or immunity, claimed by him, and that the same was decided adversely to him.

This brief is respectfully submitted, in opposition to the statement of the Appellant, disclosing the basis on which it is contended that this Court has jurisdiction. By an entry made by this Court October 28, 1929, consideration of its jurisdiction was postponed until final hearing. This brief is also offered in opposition to the brief of the Appellant upon the merits of the cause.

SUBJECT OF THE SUIT.

The Constitutionality of the provisions of the Ohio Statutes (Gen. Code Sections 2976-1 to 2976-10i) which have brought into existence the Akron Metropolitan Park System is challenged and if adversely decided will destroy an object of great public interest and benefit.

The act was passed by the Legislature of the State of Ohio, March 6, 1917, and was amended to grant further powers in 1920; in order to provide for the preservation of natural resources, and to furnish areas to be used generally by the citizens of the district, for recreational purposes.

Since the creation of the Akron Metropolitan Park Board eight years ago it has acquired approximately 700 acres of land. Much of this has been donated to it. Under the provisions of the enactment, by virtue of which it operates, it has once submitted to the electors of the Park District the question of a special tax levy, which was authorized by a substantial majority. Much of the area acquired has been improved by planting and constructing parkways. The project has already made for itself an important place in the public interest.

CONSTITUTIONAL VIOLATIONS COMPLAINED OF.

Presenting these in the chronological order in which they appear in the record, it is found that three violations contended for arise out of issues, if at all, as to whether the Park District Act violates the Federal Constitution in the following respects:

1. It is contended that this act works a denial of republican form of government.

2. It is contended that it denies the equal protection of the laws.

3. It is contended that it operates to deny due process of law.

4. The fourth arises on a "motion to vacate judgment," addressed to the Supreme Court of the State of Ohio, after its judgment was entered, and attacks the provision of the Constitution of the State of Ohio (Sec. 2, Art. 4) by which all but one of the judges of that court must concur in order to hold a statute unconstitutional, unless in affirmance of a judgment of the court of appeals holding such statute unconstitutional. The attack on Sec. 2, Art. 4 of the Constitution of Ohio, includes two of the same alleged conflicts with the Federal Constitution, viz:

a. That Sec. 2 of Art. 4 works a denial of republican form of government.

b. That it works a denial of the equal protection of the laws.

Appellees will contend that the question of conflict with the Federal Constitution, by the Ohio Park District Act, is not adequately presented in the record and has never been passed on by the courts of the State of Ohio.

The allegations of the amended petition on which the issue is predicated, are three only and are as follows:

a. After a long paragraph of disconnected averments, it is said:

> "All of which is contrary to and in violation of the fundamental law of the land; the Constitution of Ohio, and the Constitution of the United States, that taxation and representation are inseparable." (R. 16)

b. The Park District Act complained of was passed in 1917 and amended in 1919. (R. 14) On April 17, 1925, by an act only remotely related, Township Parks were authorized. The petition (See R. 16) avers that

> "none of the electors or citizens of township, other than Twinsburg Township, Summit County, can avail themselves of the right conferred by the act of April 17, 1925, 111 Ohio Session Laws, 504, as said act cannot be given uniform operation throughout Summit

County, by reason of the establishment of the aforesaid Park District, which violates * * * the Constitution of Ohio, and constitutes a denial of the equal protection or benefit of the laws guaranteed by Section One of the 14th Amendment to the Constitution of the United States."

c. Plaintiff

"Appeals to a court of equity to prevent said acts being done all of which are contrary to the aforesaid provisions of the Constitution and the fundamental law of the land." (R. 17)

The petition in error filed in the Court of Appeals complains of the "judgment," "violating fundamental law of the land," and that the "judgment denied the plaintiff in error of the protection of the constitutional provisions set forth in the petition." (R. 11, Secs. 4th and 5th)

The petition in error filed in the Supreme Court of Ohio makes none other allegation than that "constitutional questions are involved."

The opinion of the Chief Justice of the Supreme Court of Ohio makes no mention of a federal constitutional question. (R. 21, *et seq.*, 120 O. S. 464, 166 N. E. Rep. 407.) No journal entry makes mention of a Federal Constitutional issue.

Indeed, in the motion to vacate the judgment of the Supreme Court, we find the questions seriously presented for the first time. Here plaintiff in error admits its novelty by alleging:

"that this court, like the lower court, failed to pass upon the constitutionality of Secs. 2926-10 and 2926-10h, G. C. or determine whether said Park District Act violates the Federal Constitution, and fails to state on its journal entry that no Federal question is presented, deciding or involved in this controversy." (R. 41)

A fair construction of the meager statements in the petition, and petitions in error, together with the journal

entries and opinion of the court, must lead to the conclusion that the several state courts either regarded the allegations as too indefinite to create an issue, or that the contention was waived by plaintiff.

The fourth violation complained of by appellee as set out above goes to a *title, right, privilege* or *immunity,* set up or claimed under the Constitution and adversely decided. This alleged violation of rights under the Federal Constitution was not raised on a motion for a rehearing, nor on a joinder of issues but on a motion to vacate a judgment rendered by the concurrence of two judges, and seeking to have substituted therefor the opinion of the five nonconcurring judges, as the judgment of the court. (R. 39) This motion to vacate was filed May 25, 1929, whereas the judgment was entered Mar. 27, 1929.

ARGUMENT.

It will therefore be argued as to all of these four points that (a) they were not timely asserted upon the record, and (b) that no substantial Federal question is presented.

The three alleged violations of Federal Constitutional rights are:

1. Denial of a republican form of government.
2. Denial of the equal protection of the laws.
3. Denial of due process of law.

For convenience of treatment these three alleged grounds of Federal jurisdiction will be considered as follows:

I. The alleged denial of the assurance of a republican form of government effected by a judgment made possible through the challenged provisions of the State Constitution.

II. The alleged denial, by such a judgment, of the equal protection of the laws.

III. The alleged invalidity of the Park Board Acts as working a denial of the due process of law, of the equal protection of the laws, and of a republican form of government.

These in their order—

POINT I.

THE ASSERTED GROUND THAT JUDGMENT OF STATE SUPREME COURT, MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTION, LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL, DENIES REPUBLICAN FORM OF GOVERNMENT, IS UNAVAILING, BECAUSE

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)

It Was Not Timely Asserted.

As heretofore stated, this ground was not asserted in any of the pleadings, nor contended for until after the final judgment herein sought to be reviewed. It was made the subject of a pretended ground, and asserted for the first time in a motion to vacate the judgment. It is probable that a motion to vacate a judgment raises no more extensive issues than a motion to rehear.

It will be noted from the record, page 8, that this motion was overruled, and nothing further appears as to the entry. It is our contention that a denial of this motion does not constitute a decision of the constitutional question by the State Supreme Court.

"Certain propositions must be regarded as settled.

* * * * *

(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

(3) That such claim can not be recognized as properly made when made for the first time in a petition for a rehearing after judgment."

Sayward v. Denny, 158 U. S., at 183.

"If the question is not properly reserved in the State Court the deficiency can not be supplied in either the petition for a rehearing after judgment or the assignment of errors in this court. * * *"

Harding v. Illinois, 196 U. S. 78.

"In order to give this court jurisdiction to review the judgment of the state court it must appear that some federal right, privilege or immunity was specially set up in the state court, passed on and denied."

Consolidated Turnpike Company v. Norfolk & Ocean View Railway Co., 228 U. S. 326.

"A mere assertion in a state court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."

Bowe v. Scott, 233 U. S. 658.

"An attempt to raise federal questions through an application to file a second petition for rehearing in the state court, comes too late."

Bilby, et al. v. Stewart et al., 246 U. S., 255.

"The settled rule is that in order to give it jurisdiction to review the judgment of a state court upon writ of error, the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the

court actually entertains the petition and passes upon the point."

Godchaux Company, Inc. v. Estopinal, et al., 251 U. S., 179, 181.

The rule of the Court, as stated by Chief Justice Taft, in *Tidal Oil Company, et al., v. Flannagan*, 263 U. S., 444, 455, is as follows:

> "This court has always held it a prerequisite to the consideration here of a Federal question in a case coming from a state court, that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. *A mere denial of the petition by the state court without opinion, is not enough.*" (Italics ours)

From these authorities, it would seem to follow that the question was not properly or timely presented to the Supreme Court of Ohio, and not disposed of by it.

It matters not, in our judgment, what the pleading filed seventy days after judgment was called, whether a motion to vacate the judgment or for rehearing. It was overruled and there is nothing on the record disclosing the grounds of that action. No opinion was rendered, hence there is nothing on the record presented upon which jurisdiction of this Court can be based.

Suppose we admit that the question could not have been raised at an earlier time or in any other way. Does it follow that the Supreme Court of Ohio passed upon the conflict between Sec. 2, Art. 4 of the Ohio Constitution, and the Federal Constitution? Is it not more logical to believe that the Supreme Court of Ohio held that it was a court of limited jurisdiction, having only the powers granted it, and that it could not enlarge its powers and jurisdiction by holding invalid, a limitation placed upon its powers? Such holding is in harmony with what the court held in *State, ex rel.*

Jones, v. Zangerle, 117 O. S. 507, 159 N. E. Rep. 564, wherein the court said that "the fault lies, not in the court, but in the constitutional provision." The court has referred to its inability to do otherwise in the following decisions:

Fullwood v. Canton, 116 O. S. 732, 158 N. E. Rep. 171;

Meyers v. Copelan, 117 O. S. 622, 160 N. E. Rep. 855;

Board of Education v. Columbus, 118 O. S. 295, 160 N. E. Rep. 902.

The determination of its own jurisdiction by a state court is conclusive on this Court.

Standard Oil Co. v. Missouri, 224 U. S. 270, 281.

The decision of *Fullwood v. Canton, supra,* wherein it appears that the divided action of the Supreme Court of Ohio was probably sought to be taken advantage of on a writ of error filed in this Court, held that no federal question was presented.

Fullwood v. City of Canton, 275 U. S. 484, 48 S. Ct. Rep. 31.

(b)

It Presents no Substantial Federal Question.

As to the merit of the claim that the judgment of the State Supreme Court, made possible by the limitations of the provisions of the State Constitution, affecting the State Court's power to declare laws unconstitutional, denies to the litigant a republican form of government, it would seem sufficient to say that this Court has decided and declared that it has no jurisdiction to enforce the guaranty of a republican form of government assured by Section 4 of Article IV of the Federal Constitution, for the reason that what constitutes a republican form of government within this clause of the Federal Constitution is a political ques-

tion, which is solely for the consideration, determination and enforcement by the Congress.

"The enforcement of the provision in Section 4 of Article IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts."

Pacific States Telephone and Telegraph Co. v. Oregon, 223 U. S. 118;

O'Neill v. Leamer, 239 U. S. 244 at 248;

State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio, 241 U. S. 565 at 569.

Forsyth v. Hammond, 166 U. S. 506, (at page 519):

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Mountain Timber Co. v. State of Washington, 243 U. S. 219 (at page 234):

"It is urged that the law violates §4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form

of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts."

POINT II.

THE ASSERTED GROUND OF A DENIAL OF EQUAL PROTECTION OF THE LAWS BY THE JUDGMENT OF THE STATE COURT MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTIONS LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL IS UNAVAILING BECAUSE—

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)
It Was Not Timely Asserted.

What has heretofore been said under Section (a) of Point I of this brief, applies here, and if it should be contended that the decision upon the federal question *"arose out of the decision"* of the Supreme Court of Ohio, the history of the amendment of February 17, 1922, amending section 237 of the Judicial Code, (which was expressly repealed by the Act of February 13, 1925,) should be considered. In speaking of this amendment in the case of *Tidal Oil Co., et al., v. Flannagan, supra,* the Chief Justice said at page 454:

> "The intention of Congress was * * * to permit a review on writ of error in a particular class of cases in which the defeated party claims that his Federal Constitutional rights have been violated by the judgment of the state court itself, and further to permit the raising of the objection after the handing down of the opinion. * * *"
>
> "The question in such cases could not well be raised until the handing down of the opinion indicating

that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

The amendment was for the purpose of changing the law. The amendment was expressly repealed. The law then reverted to its former state, and passing upon this phase of the history of the statute, the author of the text of *Montgomery's Manual of Federal Jurisdiction and Procedure,* Third Edition, in Section 1061, page 806, says:

> "From the rule that the federal question or assertion of federal right must have been presented or asserted in the state court, it resulted that, if the judgment of such court in and of itself worked a denial of constitutional right, the injured party was without remedy, unless the state court actually entertained and considered the question upon rehearing."

Thus it is that the law is now as it was before the amendment, and as the question was raised for the first time by the petition for rehearing, and the same was merely denied, the Federal question is not saved upon the record, since in the language of this court, "a mere denial of the petition by the state court without opinion, is not enough."

(b)

It Presents No Substantial Federal Question.

The provision of the Ohio Constitution under question is Article IV, Sec. 2 and is as follows:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

A provision of the State Constitution which applies uniformly to all citizens and residents of Ohio who desire

to contest the constitutionality of any statute does not deny equal protection of the laws. If it neither differentiates between citizens or residents, or classes thereof, nor between the citizens and residents within a district of the State, it does not work an inequality in the protection of the laws.

Mr. Justice Bradley, giving the opinion of the Court in the case of *Missouri v. Lewis,* 101 U. S. 22, at page 30, says:

> "Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place, and under like circumstances.
>
> The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side, no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist

in the several States, without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States can not be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State.

Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

In the event the Constitution of Ohio had no provision for a review whatsoever by the State Supreme Court of the judgments of the several courts of appeal (each being of limited and distinct territorial jurisdiction), there would be no denial of the guaranty of equal protection of the laws, notwithstanding that the effect of the absence of such a provision might be that statutes would be enforced in certain counties of Ohio as constitutional, and ignored in others as unconstitutional; and clearly this would be true, even though there was nothing in the subject-matter of the statutes, in force or ignored, that on principles of classification afforded a basis for territorial discrimination. Justification for the enforcement of the statute in the one district, and for its being ignored in the other, so far as the Federal right is concerned, would be found in the fact that the Court of Appeals in the one district regarded the statute as constitutional, and that the Court of Appeals in the other district regarded it as unconstitutional.

If all of the courts of appeal in the State uphold the constitutionality of a given statute, their decisions are reviewed on the same basis by the Supreme Court. If all of the courts of appeal in the State hold a statute unconstitutional, those decisions are likewise reviewed on the same basis by the Supreme Court. The different bases of decision in the Supreme Court provided for by the amendment to the State Constitution only become operative when there is a divergence in the decisions of the courts of appeal, a divergence which the State of Ohio is under no Federal obligation to prevent or cure.

In view of the fact that the provision of the State Constitution under attack can only operate to preserve an existing divergence of decision among the lower courts, and can not create divergence where none existed below, it can not be said that the position of any citizen is any worse than it would have been if the State Constitution had denied the Supreme Court any power whatsoever to reverse or affirm unconstitutional decisions of the several lower courts.

There is no existent divergency of decision, and there can be no inequality, unless and until a discrimination is worked by the happening of a contingency which may never arise.

If all the courts of appeal should decide the same question, in the same way, there could in fact be no divergency, no discrimination, no inequality.

An individual cannot show discrimination until he can definitely point to one in whose behalf the law has been decided differently. The appellant in this case cannot so do, for no different decision has been made in any other court of appeals, and all individuals in her district are affected similarly.

The mere possibility that at some time some court of appeals may decide the question differently, and that the

Supreme Court may then affirm that decision, and that thereby a citizen in a different district will be affected differently than the appellant, is not enough to raise the constitutional question at this time. Such a question now is abstract and moot.

> "But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it."
>
> *California v. San Pablo and Tulare Railroad Company,* 149 U. S. 308 at 314.

> "It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."
>
> *Southern Railway Co. v. King,* 217 U. S. 524 at 534.

> "The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."
>
> *Castillo v. McConnico,* 168 U. S. 674, 680.

This rule is applied in *Board of Trade of the City of Chicago, et al. v. Olsen, et al.,* 262 U. S. 1, at page 43, wherein the court refused to consider the constitutionality of a statutory provision on the ground that the execution of the provisions of the act never operated so as to put the plaintiff in danger of suffering prejudice thereunder.

We submit that there is no discrimination, either as to persons or as to locality. The first is not debatable, and if there is a discrimination at all, it is between the various districts comprising the jurisdiction of the various courts of appeal. The division into districts of a state for the purposes of the administration of justice is legitimate, for as this Court decided in *Missouri vs. Lewis, supra,* the guaranty of the equal protection of the laws under the Fourteenth Amendment is given to individual citizens, and not to localities.

The provision of the State Constitution requiring the concurrence of six judges of the Supreme Court to deny the constitutionality of a State statute which has been upheld by a Court of Appeals, merely provides a method of review. It would, of course, have been entirely competent for the people of Ohio to provide in their Constitution that the decision of the Courts of Appeals on a constitutional question should be final. Instead of doing that, however, the people did provide that such a decision should be final *unless* it was reversed by the Supreme Court of the State, six judges concurring. Since it would have been competent for the Constitution to give entire finality to the decisions of the Courts of Appeals, it is difficult to see how this conditional finality can be held offensive to any restraint imposed by the Constitution of the United States.

For further illustration, if the Constitution of Ohio had provided that decisions of the Courts of Appeals should be final unless reversed by the unanimous decision of the Supreme Court, or by one more than a majority, or any other limitation of the same general character, it would merely have been tantamount to saying that the Courts of Appeals are to be the courts of final decision in Ohio unless their opinions are so clearly wrong that a unanimous judgment of reversal can be obtained from the Supreme Court.

It must be remembered that the judicial sections of the Constitution of Ohio were framed with the thought of cutting down the overburdened docket of the Supreme Court of the State and giving as much finality as possible to the decisions of the Courts of Appeals. Looked at in this light, it is merely an effort to give finality to the decisions of the Courts of Appeals, but at the same time providing an ultimate remedy which will not be resorted to except in cases of manifest and incontrovertible error.

The six to one proviso applies in *every* case in the Supreme Court in which a constitutional question is involved, *except only* a case in which the Court of Appeals has held a law unconstitutional. In other words, it applies to all cases involving constitutional issues which are in the Supreme Court in consequence of the original jurisdiction of the court, and not merely to cases before the court by virtue of its appellate jurisdiction. From this it follows that the six to one proviso is the *general* provision of the Constitution and the provision permitting the Court to act by a majority vote in upholding a decision of the Court of Appeals declaring a statute unconstitutional is in fact the exception thereto.

The equal protection clause of the Fourteenth Amendment does not prevent the application by a state of different laws and different systems of judicature to its various local subdivisions.

It must be conceded that it is the right of every state to establish such courts as it sees fit and to prescribe their several jurisdictions as to territorial extent, subject matter and amount and the finality and effect of their decisions. It must be conceded that a state may adopt any system of law or judicature it sees fit for all or any part of its territory, and the diversity of law which may result in the respective districts of the state do not constitute a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Appellant claims that Section 2 of Article IV of the Constitution of Ohio denies due process of law. It is not his contention that the judgment sustained the validity of a statute which itself denied due process of law. That is an entirely different question. Appellant's contention amounts to a claim that after a full and complete hearing in the trial court and one appellate court, a provision that in the event of a further appeal to the Supreme Court of the State on a constitutional question, the judgment of the Court of Appeals declaring a law constitutional shall not be reversed except with the concurrence of at least six of the judges of the Supreme Court, constitutes a denial of the due process of law *per se*, as a matter of procedure or of the jurisdiction of the Supreme Court of Ohio. Obviously this claim is without merit for all that is necessary to constitute due process of law as a matter of procedure is notice, fair opportunity to be heard, and the withholding of a decision until there has been a fair hearing. The right to a review is not essential to due process of law. Hence, the opportunity which is afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals satisfies all requirements of due process of law.

Reetz v. Michigan, 188 U. S. 505;
Pittsburgh, etc. Ry. Company v. Backus, 154 U. S. 421;
McKane v. Durstin, 153 U. S. 684, 687;
Rogers v. Peck, 199 U. S. 425, 429;
Plymouth Coal Company v. Pennsylvania, 232 U. S. 531.

Statutes are not to be declared unconstitutional unless they are clearly so, resolving all doubts in favor of the constitutionality of the statute and the requirement of the con-

currence of six of the seven judges is but a recognition of this principle.

The soundness of the logic of any contention is often judged by its resultant effect. If the claim of the appellant is to be sustained, the resultant effect would be that the Supreme Court of Ohio would be deprived of a part of its jurisdiction or its jurisdiction would be dictated by this Court's decree. This would be contrary to the accepted policy and law of the land to the effect that the manner of creation of a state Supreme Court, its jurisdiction and its procedure are matters over which the people of the state have exclusive jurisdiction.

> "And, as our decisions show, there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of the state court under the Constitution and Statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court."

Gasquet v. Lapeyre, et al., 242 U. S. 367, at 369-70;

Iowa Central Ry. Company v. Iowa, 160 U. S. 389, 393;

Castillo v. McConnico, 168 U. S. 674, 683;

Rawlins v. Georgia, 201 U. S. 638;

Burt v. Smith, 203 U. S. 129, 135;

Standard Oil Company of Indiana v. Missouri, 224 U. S. 270, 280, 281;

DeBearn v. Safe Deposit and Trust Company, 233 U. S. 24, 34;

McDonald v. Oregon R. R. & Navigation Company, 233 U. S. 665, 669, 670;

Missouri v. Lewis, 101 U. S. 22, 30;

Mallett v. North Carolina, 181 U. S. 589;
First National Bank in St. Louis v. State of Missouri, 263 U. S. 640, 661;
American Ry. Express Co., v. Kentucky, 273 U. S. 269.

In *Standard Oil Company of Indiana v. Missouri,* 224 U. S. 270, 286, *supra,* Mr. Justice Lamar says:

> "But the power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state for right of appeal is not essential to due process of law."

A limitation of the jurisdiction of the Supreme Court with respect to judgments rendered by the Courts of Appeals involves solely a question of state policy; this is whether the limitation took the form of vesting the Supreme Court with jurisdiction *only* to review decisions of the Courts of Appeals holding statutes unconstitutional—leaving the decision of the Courts of Appeals final in cases in which they had upheld the constitutionality of statutes—or by differentiating in the two classes of judgments by permitting the Supreme Court by a majority vote to affirm or reverse a judgment of a Court of Appeals holding a law unconstitutional and requiring more than a majority to reverse a judgment holding a law constitutional.

The following cases analogous to the situation presented in the leading case of *Missouri v. Lewis,* 101 U. S. 22, *supra,* are in accord with the decision in that case.

Hayes v. Missouri, 120 U. S. 68, holds that it is not a denial of equal protection to give to persons accused of crime in cities of a population of over 100,000, fifteen peremptory challenges to jurors while persons in other places are allowed only eight.

Gardner v. Michigan, 199 U. S. 325. Under the existing laws the method of selecting jurors was different in

Wayne County than in the rest of the State. Held not a denial of equal protection.

Chappell Chemical & Fertilizer Company v. Sulphur Mines Company, 172 U. S. 474. The Maryland constitution abridges the right of trial by jury in certain cases in the City of Baltimore. Held not to deny equal protection.

Hallinger v. Davis, 146 U. S. 314. Held not to be a denial of equal protection for a law to empower the court to take a case from the jury when a party pleads guilty to the crime of murder. In other murder cases, the jury determines the degree of the crime.

O'Campo v. U. S., 234 U. S. 91. Persons accused of crime who are tried before the court of first instance in Manila were denied the right to a preliminary examination given in all similar courts elsewhere. Held proper even though the act of Congress governing the Philippines guaranteed equal protection.

It is a familiar doctrine that courts shall not lightly disturb the enactment of the legislative branch of the government. One quotation will suffice,—by Harlan, *J.*, in *Henderson Bridge Company v. Henderson*, 173 U. S. 592, at 615:

> "As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

"Too clear to admit of dispute." Is the repugnancy too clear to admit of dispute when three of seven judges deny the repugnancy? Are the people of a state to be criticised for not wishing their legislative enactments to be

put to such a hazard? Are they not justified in adopting the principle expressed by Justice Harlan and making it operative through a requirement of more unanimity than a bare majority?

Furthermore, apart from the single inquiry into its legality, the wisdom or unwisdom of a legislative enactment or constitutional requirement is not a proper subject of judicial inquiry. This principle is expressed by Chief Justice White, in the case of *McCray v. United States*, 195 U. S. 27, at 53:

> "Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

POINT III.

THE ASSERTED GROUND OF A DENIAL OF DUE PROCESS OF LAW, OF EQUAL PROTECTION OF THE LAWS, AND OF A REPUBLICAN FORM OF GOVERNMENT, BY REASON OF THE ALLEGED INVALIDITY OF THE VARIOUS PROVISIONS OF THE OHIO PARK BOARD LAW IS UNAVAILING, BECAUSE

(a) Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

(b) No substantial Federal question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

(c) No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board law the taxpayers of the district are burdened unequally.

(a)

Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

What has hereinbefore been said under Section (b) of Point I of this brief applies here.

(b)

No substantial question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

Appellant's brief (pages 26 and 27) enumerates various provisions of the Ohio Park Board Law alleged to be repugnant to the due process and equal protection clauses, and to the guaranty of a republican form of government, contained in the Federal Constitution. It is impossible from a perusal of said brief to determine which of said provisions of the Ohio Park Board Law are claimed to be repugnant to the due process clause; which provisions are claimed to be repugnant to the equal protection clause, and which are claimed to be repugnant to Article 4, Section 4 guaranteeing a republican form of government to every state.

If, as contended above, there is no merit in appellant's contentions relative to denial of a republican form of government, there remains to be considered only the question of alleged repugnancy to the due process and equal protection clauses of Section 1 of the 14th Amendment.

The enumeration of points above referred to appearing at pages 26 and 27 of appellant's brief complains of four provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to the probate judge of a county; and further complains of six provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to non-elected park commissioners.

Following the great Dayton Flood, there was enacted in 1914 by the Legislature of Ohio the so-called Conservancy Act of Ohio, (Sections 6828-1 to 6828-79 inclusive) the constitutionality of which under the Federal Constitution has been upheld by this Court. Since there will be found in the Conservancy Act of Ohio provisions similar to every one of the aforementioned ten Ohio Park Board Law Provisions of which appellant complains, we parallel below such provisions of both acts. (Italics ours)

(Note: See appellant's brief pages 26 and 27, 2a and 2b for list of these points)

COMPARISON OF PROVISIONS IN OHIO PARK BOARD LAW AND CONSERVANCY ACT OF OHIO.

OHIO PARK BOARD LAW	CONSERVANCY ACT OF OHIO
A. DUTIES TO BE PERFORMED BY JUDGE.	
Section 2976-2.	Section 6828-3.
"Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district."	"Before any court shall establish a district as outlined in (G. C. 6828-2), a petition shall be filed in the office of the clerk of said court, signed either by five hundred freeholders, or by a majority of the freeholders, or by the owners of more than half of the property, in either acreage or value, within the limits of the territory proposed to be organized into a district. Such a petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district, in such manner as it may prescribe, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the freeholders of such public corporation, as they appear upon the tax duplicate; and thereafter it shall not be necessary for individuals within said public corporation to sign such a petition. Such a petition may also be signed by railroads and other corporations owning lands. And such petition may also be filed by any city or cities interested in some degree in the improvement, upon proper action by their governing bodies."

(a)

Section 2976-4.

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be *conducive to the general welfare*, he shall enter an order creating the district under the name specified in the application." * * *

(b)

Section 2976-4.

"* * * The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality."

Section 6828-2.

"The court of common pleas of any county in this state, or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority, *when the conditions stated in the third section of this act are found to exist*, to establish conservancy districts, * * *."

Section 6828-3.

"* * * Second: The necessity for the proposed work and that it will be *conducive to the public health, safety, convenience or welfare.*"

Section 6828-59.

"Lands may be included in more than one district.—The same land, if *conducive to public health, safety, convenience or welfare*, may be included in more than one district and be subject to the provisions of this act for each and every district in which it may be included, provided, that no district shall be organized under this act in whole or in part within the territory of a district already organized under this act until the court or courts determine whether the public health, safety, convenience or welfare demand the organization of an additional district, or whether it demand that the territory proposed to be organized into an additional district shall be added to the existing district; and in case the proceedings concerning two or more such districts are before the court of common pleas of two or more counties, such determination shall be as provided in the next section."

Section 6828-60.

"* * * At such conference, the several judges shall determine to what extent the several districts should be consolidated or to what extent the boundaries should be adjusted in order to most fully carry out the purposes of this act; and they shall by suitable orders make such determination effective."

Section 6828-28.

"Lands affected outside of district.—If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in

the district, they shall appraise the benefits and damages to such land, and shall file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"Notice of hearing on land excluded from or taken into district.—If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on appraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

(c)

Section 2976-5.

"Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms, shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years."

Section 6828-8.

"Within thirty days after entering the decree incorporating said district, the court shall appoint three persons, at least two of whom shall be resident freeholders within the district, as a board of directors of the district—one for a term of three years, one for a term of five years, and one for a term of seven years. At the expiration of their terms of office appointment shall be made for terms of five years. The court shall fill all vacancies which may occur on the said board."

(d)

Section 2976-10d.

"When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows: Upon the

Section 6828-28.

"If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, they shall appraise the benefits and damages to such land, and shall

filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality."

file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on apraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

B. Duties to be Performed by Commissioners.

(a)

Section 2976-10g.

"The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of land, and for the protection and preservation of the parks, parkways and other reservations of land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor * * *."

Section 6828-19.

"* * * the board of directors may make regulations for and may prescribe the manner of building bridges, roads or fences or other works in, into, along or across any channel, reservoir or other construction; * * *"

"* * * The construction of any works in a manner harmful to the district or to any water course therein, and in a manner contrary to that specified by the directors, shall be a misdemeanor, * * *"

Section 6828-65.

"Right to police district.—The board of directors shall have the right to *police* the works of the district, and in times of great emergency may compel assistance in the protection of such works, and shall, also, have the right to prevent persons, vehicles or live stock from passing over the works of the district in any manner which would result in damage thereto."

(b)

Section 2976-10.

"Such a board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

(c)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare." * * * "Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered * * * to hold, encumber, control, to acquire by donation, purchase or condemnation to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

(d)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reserva-

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

tions and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

(e)

Section 2976-10.

"Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. * * *"

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered, * * * to hold, encumber, control, to acquire by donation, purchase or condemnation, to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

(f)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare."

Section 6828-24.

"* * * All the rights and property of the district in the waters and water courses of the district, and in their uses, shall be exercised in such manner as to promote the welfare of the district * * *."

From the above, we submit, it will be found that each provision in the Ohio Park Board Law complained of in appellant's brief as being an unconstitutional delegation of legislative power to the probate judge or to the park commissioners, has its parallel in a similar provision in the Conservancy Act of Ohio. We now proceed to refer to the sweeping decisions whereby the courts have upheld the Conservancy Act of Ohio in every detail.

By singular and significant coincidence, appellant makes no reference whatever in his brief to the case of *Orr v. Allen, et al.*, 248 U. S. 35, wherein this Court upheld the constitutionality under both state and federal constitutions, of the Conservancy Act of Ohio which like the Ohio Park Board Law, was enacted pursuant to the provisions of Article 36, Section 2 of the Constitution of the State of Ohio.

Practically all of the constitutional questions at issue as to the Ohio Park Board Law were in issue in the litigation relating to the Conservancy Act of Ohio and the decision of the Supreme Court of the United States in *Orr v. Allen, et al., supra,* in upholding the constitutionality of the Conservancy Act establishes the constitutionality of similar provisions of the Ohio Park Board Law.

The memorandum opinion by the Chief Justice in *Orr v. Allen, et al., supra,* is as follows (italics ours except as to cases cited):

> "The 'Conservancy Act of Ohio' is the name given the statute by its first section. Its seventy-nine sections are thus epitomized in the title: 'To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts.' Ohio Gen. Code, §§6828-1 to 6828-79; Laws of Ohio, vol. 104, p. 13. The statute was admittedly designed to prevent the recurrence of the unprecedented and disastrous flood which invaded the Miami Valley in 1913. Briefly, there was

provision for drainage districts, for boards to plan, construct and maintain the works contemplated, with the right to exert eminent domain, and to raise money by taxation, by assessments for benefits, and, in some cases, by issue of bonds. Every person affected who was aggrieved was undoubtedly given ample means by the statute to test judicially his grievance.

"A district was organized embracing land along each side of the Miami River which had been flooded in 1913 or which was required for reservoir sites or for furnishing material.

"The appellant, a citizen of California owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the constitution of the State and that of the United States. The court, organized under §266 of the Judicial Code, *in a careful and clear opinion* disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

"All the contentions rest upon one or the other or both of two propositions; (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by Government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the constitution of the State forbids the exertion of a legislative power which the same court has expressly held the legislature possessed. The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

"Thus concluding, we think nothing is required to dispose of the controversy but to cite the two lines

of cases referred to. (1) *Snyder v. Deeds,* 91 Ohio St. 407; *Miami County v. Dayton,* 92 Ohio St. 215; *County Commissioners v. Gates,* 83 Ohio St. 19, 34; *State ex rel. Franklin County Conservancy District v. Valentine,* 94 Ohio St. 440; (2) *Houck v. Little River Drainage District,* 239 U. S. 254, 262, and cases cited."

The syllabus in said case recapitulates the decision in the following words (italics ours):

> "The 'Conservancy Act of Ohio,' designed to prevent floods, and authorizing creation of drainage districts, and drainage improvements through administrative boards empowered to exert eminent domain, and to tax, assess for benefits, and issue bonds, affords full opportunity for testing private grievances judicially, and, *as correctly construed by the court below,* is consistent with the state and federal constitutions. 245 Fed. Rep. 486, affirmed."

The conservancy provision of the Ohio Constitution was adopted on September 3, 1912, and the Dayton flood did not occur until March 1913. Judge Wanamaker says in *County of Miami, et al. v. City of Dayton, et al.,* 92 O. S. 215, 224:

> "This amendment was adopted September 3, 1912, and reads almost like a prophecy of Jeremiah as to the terrible floods that visited different portions of the State in March of the following year."

The decision of the U. S. district court (*Orr v. Allen, et al.,* 245 Fed. 486) which was incorporated by reference into the Supreme Court opinion holds that the due process and equal protection requirements of the Constitution are satisfied for the following reasons:

> 1st. Because a state has power to require local improvements to be made which are essential to the health, comfort, safety and prosperity of the community.
>
> 2nd. Because a public use resulted from the Act which justified the exercise of the power of eminent domain and the levy of taxes.

3rd. Because the costs of the improvement were apportioned within the taxing district in a just and reasonable mode according to benefits.

4th. Because it provides notice to the landowners and a hearing upon every essential question of fact involving the creation of the district and the rights of taxpayers.

5th. Because a levy of an ad valorem tax upon the property in the conservancy district for the purpose of paying preliminary expenses does not violate the 14th Amendment to the Federal Constitution.

6th. Because the decision of the Ohio Supreme Court in *Miami County v. Dayton*, 92 O. S. 215, sustained the Act in an opinion, which though not controlling, was said by the Court to be entitled to great weight.

The decision in *County of Miami, et al. v. City of Dayton, et al.*, just referred to, was also cited with approval in the Supreme Court opinion in *Orr v. Allen, supra.* The opinion of the case, after setting forth principles similar to those adopted by the Federal Court decision in *Orr v. Allen*, makes the further statement that to delegate the power to the Common Pleas Court to organize the district is not unconstitutional. The syllabus of the court on this point reads as follows:

"Where a power is quasi-legislative, quasi-administrative, or quasi-judicial, or so mixed in its nature that it may be regarded as a combination of all of them, the Legislature may in the first instance characterize such power and confer it either upon an existing agency of the government or an agency especially created for that purpose. There is no delegation of legislative power in the Conservancy Act violative of any constitutional provision."

The constitutionality under the Federal Constitution of the Conservancy Act of Ohio was also considered in

Silvey, et al. v. Commissioners of Montgomery County, Ohio, et al., 273 Fed. 202. The court says at page 204:

"The act in question is charged to be obnoxious in 6 different respects to the Constitution of the United States and to some 37 provisions of the Constitution of Ohio. Most of the objections urged are unimportant and even frivolous. Only those will be considered which are deemed worthy of notice.

"The bill charges that the act deprives the plaintiff and other similarly situated property owners of their property without due process of law and denies them the equal protection of the law. The fallacy of this claim has been conclusively settled by *Miami County v. Dayton*, 92 O. S. 215, 110 N. E. 726; *Orr v. Allen*, (D. C.) 245 Fed. 486 (a three-judge case), and *Orr v. Allen*, 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109. See also, *O'Neill v. Leamer*, 239 U. S. at page 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

"The averment is made that the Conservancy Act, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and by conferring jurisdiction and authority on such court to establish conservancy districts, delegates legislative power to such court, and thereby violates both the state and the federal Constitution. This contention was decided adversely to plaintiff in *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068, and *Miami County v. Dayton*, 92 Ohio St. 215, 234, 235, 110 N. E. 726. Drainage or conservancy districts may, like school districts, be established by legislative sanction. The power conferred on the court of common pleas is not unlike that delegated to township trustees, county commissioners, and other bodies, authorizing them to organize districts for the construction of public improvements and for taxing or assessing the lands benefited thereby. Such enactments have almost uniformly been held to be a delegation of legislative power, not prohibited by the organic law. The propriety of delegating authority to a local court to frame a conservancy district is, in any event,

a state question. *O'Neill v. Leamer*, 239 U. S. at pages 247, 248, 253, 36 Sup. Ct. 54, 60 L. Ed. 249."

Again at page 206 the Court says:

"The Fourteenth Amendment to the Federal Constitution does not deprive the state of the power of determining whether the officers of the conservancy district shall be appointed or be elected by the people, or the duties to be performed by them; nor does it invalidate a tax levy or an assessment lawfully made by such officers for a duly authorized improvement, or deprive the district as a political subdivision of the power to levy and collect taxes or assessments to pay the amount charged against property or political subdivisions, such as municipalities, counties, or townships, within such district. *Soliah v. Heskin*, 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294."

"Without entering upon a further detailed consideration of the case, it may be said that every substantial objection now urged against the Conservancy Act and depending upon the federal or state Constitution or laws has been decided adversely to the plaintiff, as will appear from *Miami County v. Dayton*, 92 Ohio St. 215, 110 N. E. 726; *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068; *Orr v. Allen* (D. C.) 245 Fed. 486, affirmed 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109; *Koehne v. City of Dayton*, 97 Ohio St. 341, 119 N. E. 651, and from the unreported cases of *County of Miami v. Deeds*, No. 15,347, *Koehne v. Miami Conservancy District*, No. 15,779, *Blevins v. Miami Conservancy District*, No. 15,965, *Hawthorne v. City of Troy*, No. 16,653, and *State ex rel. Silvey and Blevins v. Miami Conservancy District*, No. 16,699, 130 N. E. 943, all decided by the Supreme Court of Ohio. Rarely has a law been found which has been assailed with such frequency or from so many angles. It has withstood every test. The Ohio courts for some time past, as evidenced by many cases, have treated its constitutionality as settled beyond controversy, * * *"

The following paragraphs from the syllabus recapitulate the court's decision on these constitutional points:

> "The Conservancy Law of Ohio does not, as to a taxpayer of the city of Dayton, work a deprivation of property without due process of law, or deny equal protection of the law."
>
> "The Ohio Conservancy Law, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and conferring jurisdiction and authority on such court to establish conservancy districts, is not invalid under the state and federal constitutions as unlawfully delegating legislative power to such court."
>
> "The propriety of delegating authority to a local court to frame a conservancy district is a state question."
>
> "Const. U. S. Amend. 14, does not deprive the state of Ohio of the power of determining whether officers of the conservancy district shall be appointed or elected by the people, or prescribing the duties to be performed, nor does such amendment invalidate a tax levy, or an assessment lawfully made by such officers for a duly authorized improvement."

The case of *Soliah v. Heskin, et al.*, 222 U. S. 522, at page 524, cites with approval *Prentis, et al. v. Atlantic Coast Line Company*, 211 U. S. 210, which holds that so far as the Federal Constitution is concerned a State may, by constitutional provision, unite legislative and judicial powers in the same body.

Thus, it is seen the courts have established the constitutionality under the Federal Constitution of provisions similar to those contained in the Ohio Park Board Law and the omission in appellant's brief of mention of the line of cases by which such constitutionality is established is significant.

From a comparison of the provisions of the Conservancy Act of Ohio and the Ohio Park Board law, and from a consideration of the aforementioned decisions relating to the Conservancy Act of Ohio, it is clear, we submit, that no substantial contention has been raised by appellant with reference to alleged delegation of legislative power to the probate judge, or to non elected park commissioners.

Each of the ten provisions of the Park Board Law, challenged by appellant's brief, finds its counterpart in a similar provision in the Conservancy Act.

1. The provisions of G. C. 2976-4 of The Park Board Law relative to finding that creation of district will be conducive to the general welfare, similarly appear in G. C. 6828-2 and 6823 of the Conservancy Act.

Appellant's reference to the petitioners as "self constituted" conveys an impression which is not substantiated by an analysis of The Park Board Law. G. C. 2976-2 prescribes very definite qualifications for petitioners. They must reside in the proposed district, and must constitute a majority of the electors residing therein; or in lieu of the signatures on the application, the petition may be "authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district." While the initiative must come from the electors or the legislative bodies of the governmental subdivisions in the proposed district, the applicants are no more "self constituted" than those who sign a petition under the initiative and referendum provisions of a State constitution, or in the nomination of a candidate for public office.

2. G. C. 2976-4, relative to changing the limits of the proposed district is similar to G. C. 6828-60 of the Conservancy Act.

Appellant's statement that the probate judge is given power to "mold" the boundaries of the district overstates the provision of the statute. The judge may only reduce the size of the district as provided by the Park Board Law. Appellant cites no instance where the judge has availed himself of even this limited power, nor so far as we are informed, has there ever been such an instance.

3. G. C. 2976-5 relating to appointment of park commissioners corresponds to G. C. 6828-8 of The Conservancy Act. The only distinction between the Conservancy Act requirements and the Park Board law requirements is that the former provides that two of the three board members shall be resident freeholders of the district, while the latter provides for no such qualification. No authority is cited to show that this is contrary to the Federal Constitution, and no basic reason is advanced for the contention.

4. G. C. 2976-10d, relative to expansion of district, when found to be "conducive to the general welfare" is not different in principle from G. C. 6828-28. The contention is essentially the same as appellant's first contention, referred to above.

5. G. C. 2976-10g relative to misdemeanors and police powers is in effect the same as G. C. 6829-19 and 6828-65 of The Conservancy Act wherein similar powers are given to appointive directors.

In *Soliah vs. Heskin, et al., supra,* the Supreme Court of the United States has decided that the 14th Amendment does not deprive a state of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or elected by the people.

6. G. C. 2976-10 of The Park Board Law and G. C. 6828-43 of the Conservancy Act of Ohio, alike confer upon appointive officials the tax levying power.

Under The Conservancy Act, certain of the levies may be "upon the property of the district"; while others are to be "on all real property, upon which benefits have been appraised." In the litigation relating to the Conservancy Act (*Orr vs. Allen, et al.*, 245 Fed. 486; *County of Miami, et al., vs. City of Dayton*, 92 O. S. 215), the court held certain ad valorem levies on real estate only, to be in the nature of general assessments, because under the uniform rule of taxation in the Ohio Constitution, an ad valorem general tax would have had to be upon real and personal property alike. The decisions in such litigation therefore met the exigencies of the situation so far as the uniform rule of taxation then in effect in Ohio was concerned, but there is nothing in the decisions growing out of such litigation intimating that the question as to whether the 14th Amendment to the Federal Constitution was violated depended upon whether the levies were held to be in the nature of general taxes or in the nature of special assessments.

If the Federal Constitution permits the Legislature to authorize the levying of special assessments by the appointive board, it does not stay the hand of the Legislature in the matter of general taxes.

All taxation general or special is an exercise of the same sovereign power, namely, the power of taxation, and there is no basis for the claim that the one, any more than the other, violates the Fourteenth Amendment.

7. G. C. 2976-7 of The Park Board Law and G. C. 6828-18 of the Conservancy Act alike confer the power upon appointive officials to acquire land without, as well as within, the district.

Concerning the acquisition of lands *without* the district, the like power is of course generally conferred upon the different political sub-divisions, and the rights of the taxpayers are not prejudiced by the fact of the outside

acquisition, *unless* it affirmatively appears that there is an abuse of discretion. The Cleveland Airport is an illustration of the fact that suitable areas or facilities may not be available within the sub-division limits.

The virtual necessity of going beyond the subdivision limits in some cases is illustrated by the fact that the water supply of New York City and of many other cities is procured from many miles beyond the city limits. A municipality has ample authority to provide recreation areas for its inhabitants, and yet proper recreation areas may be entirely lacking within the municipal limits. There would seem to be no more basis for the proposition that a city or park district must keep within its territorial limits in acquiring land, than there would be for the proposition that it could not purchase supplies from a source beyond its boundaries.

8. The power of eminent domain is conferred upon park commissioners by G. C. 2976-7, and also upon conservancy directors by G. C. 6828-18.

9. As appears in G. C. 2976-10, and G. C. 6828-43 and 6828-15, the directors under the Conservancy Act have power to acquire lands without the district and visit the cost upon taxpayers within it to the same extent as in The Ohio Park Board Law.

10. Appellant complains that the Ohio Park Board law is repugnant to the Federal Constitution in delegating to non-elected park commissioners the legislative power to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare."

An examination of G. C. 2976-7 shows that no unlimited discretion is given to the commissioners, but that the very sentence containing the language appellant complains of, enumerates the things which the commissioners are au-

thorized to do, and merely states that the things specified must be done "in such manner as they may deem conducive to the general welfare." The Board is empowered to acquire lands; to create parks, parkways, and other reservations; to develop, improve and protect the same; and the Act merely provides that they must do these things in such manner as they may deem conducive to the general welfare.

The Conservancy Act of Ohio contains language similar. G. C. 6828-24 enumerates certain specific things which the directors are authorized to do, and then provides that the powers therein given "shall be exercised in such manner as to promote the welfare of the district."

The power given to the Park Board Commissioners is not unlike that given to the Secretary of Agriculture by the Acts of Congress considered by the Supreme Court of the United States in the case of *U. S. v. Grimaud,* 220 U. S. 506, wherein he was authorized to:

> " * * * make such rules and regulations and establish such service as will insure the objects of such reservation * * *."

The regulations under consideration in that case having been prescribed by the Secretary of Agriculture, an *appointive* and *executive* or *administrative official* and the violation of such regulations having the force and effect of misdemeanors and being punishable by fine, the case is a direct negation of the claim that like power conferred on the Park Board is an unauthorized delegation of legislative power.

In the Ohio Park Board law the things which the board may do "as they deem conducive to the general welfare" are not less related to the objects specifically set forth in the Act than were the powers given to the Secretary of Agriculture by the Act of Congress above referred to,

which the Supreme Court of the United States held not to be an unconstitutional delegation of legislative authority.

Generally as to the delegation of power, legislative, judicial or administrative, the court uses the following language in *Miami County v. Dayton,* 92 O. S. 215 at page 234:

> "It is difficult to see how this is any more a delegation of legislative power than the appointment of receivers and the various orders of court authorizing them to continue a going concern or to sell the same and distribute the proceeds, or to appoint appraisers in any given case, or any of the numerous boards that have heretofore been appointed by courts for the purpose of carrying out the substantial provisions of various statutory proceedings. But suppose that the powers so conferred are quasi-legislative, it must be conceded they are also quasi-administrative and quasi-judicial, and in such cases where the twilight zone of distinction prevails it has always been regarded as the right and duty of the legislature to determine the nature of the function exercised and the body that should exercise it."

By analogy to provisions in the Conservancy Act of Ohio, the constitutionality of which under both State and Federal State constitutions has been sustained, all of the contentions of the appellant relating to the delegation of power to probate judges and non-elected park commissioners are forever set at rest, and the constitutionality of the Ohio Park Board law in the particulars complained of by appellant is established.

We feel that the present case is one that calls for the strict application of the rule of *stare decisis* in regard to these statutes and requires that such recognition preclude a reconsideration of the issues.

If, for any reason, the rule thus contended for is not to be applied so as to properly preclude an argument upon

the illegality of the statutes, we then urge the same reasons and adopt the same arguments as will be found in the cases which in our opinion impel a decision in favor of the appellees, viz.: *Orr v. Allen, et al.*, 248 U. S. 435; *Orr v. Allen, et al.*, 245 Fed. 486; *Sylvey, et al. v. Commissioners of Montgomery County, Ohio, et al.*, 273 Fed. 202; and *Miami County, et al. v. Dayton*, 92 O. S. 215.

(c)

No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board Law the taxpayers of the district are burdened unequally in different ways.

In the enumeration of points appearing at pages 26 and 27 in appellant's brief, sub-section (C) reads as follows:

"(C) in burdening taxpayers of the district unequally in sundry ways."

There appears no tabulation of the points relied upon by appellant under this heading. From an examination of the record and of appellant's brief, the following appear to be the "sundry ways" to which appellant's contention may relate, although not justified upon the record facts:

(1) By permitting the board to acquire a large part of the land in any existing township, school district, or other taxing sub-division, the land acquired thereby becoming exempt from taxation so as to overburden the residue.

(2) By permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

(3) By casting upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district.

Considering these "sundry ways" in order, we respectfully submit:

(1) There is no repugnancy to the Federal Constitution in permitting the board to acquire a large part of the land in any existing township, school district, or other taxing subdivision; the land acquired thereby becoming exempt from taxation so as to over-burden the residue.

No case is cited by appellant in support of his contention nor does the record disclose facts which indicate that "a large part of the land in any existing township, school district or other taxing subdivision," has actually been acquired. Wherever property is acquired for a public purpose, both within or without a taxing district, it becomes exempt from taxation.

As a matter of fact, in the acquiring of park lands, and conserving natural resources by adding swamp lands, forest lands, etc., to the park domain, the property acquired is apt to be to a considerable extent unimproved and therefore less valuable for taxing purposes than improved property. We believe it may be fairly assumed that the taking over of such lands by the Park Board would result in a reduction in governmental expenses to an extent not unrelated to the proportional value of the lands taken as compared with the total tax duplicate of the township or village within which the lands are located.

This Court has often held that there is nothing in the Federal Constitution to prevent the state from granting exemption from taxation.

N. Y. ex rel. Metropolitan Street Railway Company v. Tax Commissioners, 199 U. S. 1;

Bell's Gap Railway Company v. Pennsylvania, 134 U. S. 232.

It has likewise been held that the State has broad discretion in the matter of creating exemptions.

Rogers v. Hennepin County, 240 U. S. 184.

At this time nothing but a moot question is presented. Obviously any church or school, as well as a park district, might acquire a whole or a substantial part of a township, but no such situation has yet occurred.

The burden does not become different in kind, but only in degree when the acquisitions are large instead of small. The objection is therefore in effect directly against the principle of *tax exemption* because the burden complained of obtains whenever there is any exemption and regardless of its extent or purpose—whether acquired for public, charitable or religious purposes.

(2) There is no repugnancy to the Federal Constitution in permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

This contention is set forth at page 9 in appellant's brief, and is presumably one of the things referred to in Item "C" set forth at page 27 of said brief where it is contended that the Ohio Park Board law is repugnant to the Federal Constitution "in burdening the tax payers of the district unequally in sundry ways."

Section 10 of the Park Board Act gives to the Board the power to levy annually not to exceed 1/10th of 1 mill, subject however, to the "combined maximum levy for all purposes otherwise provided by law."

Appellant's point is that where the district is located in more than one county the budget commission of each of the counties has control over the levy as to that portion of the park district within such county; that the budget commissioners of the two counties might not act uniformly and the result would be that there would be different rates

of taxation for park purposes in different portions of the same park district.

The complete answer to the objection is found in General Code Section 5626 which is as follows:

> "5626. Joint session of budget commission; adjustment of tax rate.—
>
> Whenever a taxing district is located in two or more counties, the budget commission of the counties in which such district is located shall meet in joint session at the call of the chairman of the commission of the county wherein the greatest amount in value of taxable property in such taxing district is located, and adjust the rates of taxation for the purpose of such district so as to enforce the limitations on the tax rate prescribed by law and to produce uniform rates throughout the districts. Provided, however, that the levies for such taxing district purposes shall not be reduced by such joint budget commission below what would be required to enforce such limitation in such part of such district in which the least reduction of such levies is necessary to enforce such limitation; and such levies so fixed shall be applied uniformly throughout the district. (112 v. 423, §1 (former §5626 repealed, 112 v. 409, §40); R. S. §2821, Eff. Aug. 17, 1927.)"

Under this section it will be seen that park board levies are applied uniformly throughout the entire district. Nothing appears in the record to show the contrary.

(3) Appellant contends that the Ohio Park Board law casts upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district; and that in this respect said law is repugnant to the Federal Constitution.

The Ohio Park Board Law was enacted by the Legislature of the State in the exercise of its police powers and

its constitutionality must be tested with reference thereto. The police powers of the state were not restricted by the conservation amendment of 1921 in Section 36 of Article 2 of the Ohio Constitution. The purpose of that amendment was to support and add to the broad powers which the Legislature had. In the Ohio Park Board Law there appears an exercise of the general police power for the advancement of the common welfare of a community combined with the exercise of the specific power conceived in the conservancy amendment.

The contention of the appellant that the result of the Ohio Park Board Law is to cast upon a particular district the burden of an improvement state-wide in its purpose is therefore, if not founded on a false premise, at least founded on an incomplete one.

The necessity for public park areas to which the people may have free and constant access is everywhere conceded. To safeguard the public health a recreational ground must be provided. When the legislature in its broad discretion adopts a procedure whereby the resident electors of any district may secure to themselves such a benefit, it is difficult to see wherein the object achieved under the law is of such a state-wide nature as to make local taxation an inequality before the law.

It is obvious that a park area in the Cleveland district will be used primarily by the residents of that district, and that the benefits resulting from the creation of the park will therefore be local rather than general.

The language of Justice Hughes in *Houck v. The Little River Drainage District,* 239 U. S. 254, at 262 applies to this situation with peculiar force.

> "In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of state funds raised by general taxation or

it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile v. Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the State alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. *Hagar v. Reclamation District*, 111 U. S. 701, 709; *Spencer v. Merchant*, 125 U. S. 345, 353, 356; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 167, 168; *Bauman v. Ross*, 167 U. S. 548, 590; *Parsons v. District of Columbia*, 170 U. S. 45, 52; *Williams v. Eggleston*, 170 U. S. 304, 311; *Norwood v. Baker*, 172 U. S. 269, 278; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Wight v. Davidson*, 170 U. S. 371, 379; *Wagner v. Baltimore*, decided this day, *ante*, p. 207."

It is true that a conservation of natural resources inures to the good of the state at large. It is not true that such a conservation does not also inure to the benefit of the district within which such conservation is made. Thus the conservation of forests is one means of flood control; the proper control of submerged and swamp lands is a good health measure; the regulation of lakes may be for a recreational purpose; and the conservation of streams will improve power and drainage facilities.

Under these circumstances the 14th Amendment to the Federal Constitution does not prevent the creation of a taxing district to assume the cost of maintaining a park and conservation area. In *County of Mobile v. Kimball*, 102 U. S. 691 (1880), the Supreme Court held that it was constitutional to assess the entire cost of a harbor improvement upon a local district even though the result of the improvement was a benefit on the entire state.

In the opinion by Justice Field, the constitutional objections were disposed of in the following language (p. 703):

> "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.
>
> "It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

A similar question was raised in *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386 (1892). In this case the statutes of South Carolina required the salaries and expenses of the State Railroad Commission to

be borne by corporations owning and operating railroads within the state. It was contended that this was a denial of equal protection because specific parties were compelled to bear the expense of an act beneficial to the state at large. The court said (p. 394):

> "There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan v. Louisiana,* 118 U. S. 455, 466. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway v. Alabama,* 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile v. Kimball,* 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State or be apportioned between them, is matter of legislative direction."

The terms of the Ohio Park Board law (G. C. 2976-4) make ample provision for a hearing prior to the establishment of the park district. While the act does not say in express terms that the possibility and degree of local benefits shall be considered therein, this can be assumed. The general provisions of the act including the right of resident electors to petition for the creation of a district, the right to levy taxes upon the district, the right of the probate judge to exclude portions of a proposed district after the hearing, and the fact of the hearing itself, lead to the conclusion that the Legislature must have intended the hearing to be upon the benefits which would result to the district.

For his contention that a park district under the Ohio Park Board law is a state improvement, the cost of which should not be cast upon taxpayers within the park district, appellant relies principally upon the case of *Wasson et al. v. Commissioners*, 49 O. S. 622 in which the court held invalid an act authorizing counties to raise money to secure the location of the Ohio Experiment Station as being in violation of Section 2, Article XII of the Ohio Constitution requiring that all taxes for general revenue for the state must be levied by uniform rule upon all taxable property therein. It does not appear that the court would have declared the law invalid, but for the uniform rule proviso in the State Constitution.

Furthermore, the principal consideration which induced the court in the *Wasson* case to hold that the Experiment Station was a state project was the fact that the Board having control of the Station was a State Board and that after the County Commissioners had paid to the Treasurer of State the proceeds of the local bond issue, the County authorities ceased to have any part in the future of the enterprise. The situation with respect to a park district is the

exact opposite. The district is organized, officered and controlled by the locality which finances its operations.

This conclusion is supported by *Embree v. Kansas City and Liberty Boulevard Road District,* 240 U. S. 242 (1916) in which a taxing district was established after a hearing under a statute which did not expressly provide that benefits should be determined. The court makes the following statement which seems to apply with full force to the Ohio Park Board law (p. 248):

> "True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries 'as the public good may require.' In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten."

The fact that the Park Board is empowered under the Ohio Park Board Law to acquire lands outside the district, the cost of which is assessed upon property within the district, is not a denial of equal protection.

The provision of the Ohio Park Board Law (G. C. 2976-7) which empowers the Park Board to acquire land without the district, states that it should do so "on behalf of said district." It therefore appears that the intention of the Legislature in giving the Park Board this power was to enable the Park Board to go outside the district and acquire land only when the needs within the district re-

quire them to do so. The result of their action therefore is a benefit to the district for which the district not only can, but should be taxed. Where the area outside the established district is sought to be improved for the benefit of property outside the established district there is a provision (G. C. 2976-10d) for annexing such property, and making it a part of the park district. The two provisions as thus viewed together clearly show what the Legislature intended the powers of the Park Board to be.

The situation is comparable to the dual power of a municipality to either annex property to its corporate limits or to go beyond such limits and acquire land for a golf course, industrial home, sewage disposal plant, etc.

In concluding the argument contained in his brief, appellant cites *Funkhouser, et al. v. Randolph, et al.*, 287 Ill. 94, 122 N. E. 144. The attention of the Court is respectfully called to the fact that the four paragraphs cited do not follow one another in the reported opinion, and that the conclusions contained in the third paragraph quoted in no respect apply to the facts contained in the first and second paragraphs quoted.

Moreover each of these conclusions was based on the provisions of the Illinois Constitution of 1870, and not on the Fourteenth Amendment to the Constitution of the United States as a casual reading of appellant's brief might imply.

CONCLUSION.

Summarizing the contentions of this brief, we urge the rejection of the appellant's claims upon the grounds of the untimeliness of the raising of the federal questions; the lack of substantiability thereof; the application of the rule of *stare decisis* as it relates to the similarity of issues disposed of in similar cases by this Court; the recognition

of the State's right to create its own Supreme Court and to regulate the procedure thereof; and the lack of judicial character of the questions raised in relation thereto and upon the further ground of the public policy of the State in relation to the exercise of its inherent police power.

The judgment of the Supreme Court of the State of Ohio should be sustained.

Respectfully submitted,

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APR 3 1
CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 237.

STATE OF OHIO, EX REL. E. H. BRYANT,
Appellant,

vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY,
F. A. SEIBERLING,
EDWARD D. ECKROAD,
MAUD I. MILAR and
JACOB MONG, COUNTY AUDITOR,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

PETITION FOR REHEARING AND SUPPORTING BRIEF.

GEORGE D. HILE,
Attorney for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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Appeal from the Supreme Court of the State of Ohio.

PETITION FOR REHEARING AND SUPPORTING BRIEF.

Appellant petitions this Honorable Court for a rehearing of this cause due to grave errors having been committed which a rehearing should avert in this, to wit:

First: That this Court by affirming the judgment of the Supreme Court of Ohio, holding that persons who are not elected can be clothed by the General Assembly with the sovereign legislative power to levy taxes, and that state legislation that does this neither violates the Federal Constitution or any of its provi ons, nor the fundamental law of the State or Nation.

Second: That this Court affirms a judgment of the Supreme Court of Ohio, which repudiates a principle of republican form of government which requires taxes to be levied by the people's representatives and that state legislation that destroys this principle of republican government does not violate the Federal Constitution or any of its provisions, although it guarantees that principle of government to the people and the constitution of Ohio assures it to them in these words:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people: and all powers not herein delegated remain with the people." (Sec. 20 Art. 1, Ohio Constitution.)

Third: This Court holds that the provision in the Ohio Constitution, Sec. 2, Art. IV, which gives the State Supreme Court jurisdiction to consider constitutional questions but denies the majority of the members constituting the Court the right to declare a statute unconstitutional when the Court of Appeals has held it valid, does not violate the Federal Constitution, even though fundamental or natural rights are violated by the act.

BRIEF SUPPORTING ABOVE CONTENTIONS.

The Court to support its holding on the question of who can levy taxes cites *Houck vs. Little River Drainage District,* 239 U. S. 254; *Orr vs. Allen,* 245 Fed. 486, 248 U. S. 35, and *Solich vs. Heskin,* 222 U. S. 522. The first came to this Court from Missouri where the legislation complained of had been sustained but the act there assailed required the officers who were given the power to levy taxes for the district to be elected. The case in 222 U. S. 522, came to this Court from North Dakota, where the State Supreme Court, held that persons who were not elected could not levy taxes, but that persons could be appointed to levy special assessments. This judgment of North Dakota Court was affirmed

by this Court on both points, while in the case at bar the ruling is that appointees can levy taxes, and is inconsistent with that in 222 U. S. 522. In *Orr vs. Allen, supra,* assessments and not taxes was the question. The power of taxation is legislative. "This power belongs, in this country, to the legislative sovereignty, State or National." *Merwither vs. Garrett,* 102 U. S. 472, page 519. This is the law in Ohio and always has been. *State vs. Toledo,* 48 O. S. 112.

The Court's attention is called to the fact that in *Board of Tuberculosis Hospital District vs. Peters,* 253 Mo. 520, and N. D. Court, in *Vallalley vs. Grand Forks Park Commissioners,* 15 L. R. A. 61, each held appointees could not exercise the power of taxation. In *Bank vs. Commissioners of Wyandott County,* 61 Fed. 486, which United States Circuit Court affirmed, the court holds the same way. In *Michigan Central Ry. Co. vs. Powers,* 201 U. S. 245, the court clearly announces that a delegation of the taxing power to appointees would violate the Federal Constitution. When the right to representation ends, arbitrary rule begins.

Natural or inalienable rights are not created by a constitution or law. Abolish constitutions and laws and they will persist to endure. Upon them governments are erected in this country.

The provision in the Ohio Constitution that gives jurisdiction to the Supreme Court when constitutional questions are involved, but denies the majority of the members to hold an act unconstitutional which has been held constitutional by a Court of Appeals either denies due process on the equal protection of the law, for the decision is that of one judge. The appellant in the State Supreme Court by the consideration of five judges won a moral victory, but this provision which does not think nor reason, deprived appellant of a legal victory regardless of the fact fundamental rights are involved which this Court holds is a matter

which belongs wholly to the state to correct. Fundamental rights seldom fail to eventually prevail. This Court has stated that the rights are protected by the Federal Constitution. There are many cases in history that show this fundamental right was asserted by Dred Scott. This Court held it had no jurisdiction but it disposed of his claim upon the merits denying his claim and a civil war was required to reverse that judgment.

The fact that this Court has affirmed the judgment of the state court, instead of dismissing for want of jurisdiction will enable the claim being made that this Court holds that taxation by appointees is legal. A rehearing is therefore asked in behalf of equity and justice.

GEORGE D. HILE,
Attorney for Appellant.

STATE OF OHIO,
CUYAHOGA COUNTY, SS.

I, the undersigned, one of counsel in the case above, do hereby certify that this petition for a rehearing is filed in good faith and not for delay.

GEORGE D. HILE.

Sworn to before me and subscribed in my presence by George D. Hile, this 5th day of April, 1930.

H. R. SNYDER,
Notary Public.

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No. 238.

FILE
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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1929.

STATE OF OHIO, EX REL.
PAULINE WADSWORTH,

Appellant,

vs.

JOHN A. ZANGERLE, Auditor of Cuyahoga County,
THE BOARD OF PARK COMMISSIONERS of
THE METROPOLITAN PARK DISTRICT IN CLEVELAND,
HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS E.
MOSES, WM. A. STINCHCOMB, and THE UNION TRUST
COMPANY, a Corporation,

Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

GEORGE D. HILE and
SNYDER, HENRY, THOMSEN, FORD & SEAGRAVE,
914 Williamson Bldg., Cleveland, Ohio,
Attorneys for Appellant.

No. 238.

In the Supreme Court of the United States

October Term, 1929.

State of Ohio, ex rel.
Pauline Wadsworth,

Appellant,

vs.

John A. Zangerle, Auditor of Cuyahoga County,
The Board of Park Commissioners of
The Metropolitan Park District in Cleveland,
Harry M. Farnsworth, Warren S. Hayden, Louis E.
Moses, Wm. A. Stinchcomb, and The Union Trust
Company, a Corporation,

Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

George D. Hile and
Snyder, Henry, Thomsen, Ford & Seagrave,
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No. 238.

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STATE OF OHIO, EX REL.
PAULINE WADSWORTH,
Appellant,

VS.

JOHN A. ZANGERLE, Auditor of Cuyahoga County,
THE BOARD OF PARK COMMISSIONERS of
THE METROPOLITAN PARK DISTRICT IN CLEVELAND,
HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS E.
MOSES, WM. A. STINCHCOMB, and THE UNION TRUST
COMPANY, a Corporation,
Appellees.

APPELLANT'S STATEMENT OF BASIS OF JURISDICTION OF THIS COURT.

(a) **Statutory Provisions Sustaining the Jurisdiction.**—U. S. Code, Title 28, §237, concerning writs of error from state courts of last resort, as modified by §861-a (Act of January 31, 1928, Chap. 14, 45 Stats. 54) substituting appeals for writs of error, and §861-b (Act of April 26, 1928, Chap. 440, 45 Stats. 466) making applicable to such appeals the statutes regulating the right to a writ of error and the practice in relation thereto, afford the statutory basis of the jurisdiction here invoked.

(b) **Dates of Judgment Sought to be Reviewed and of Application for Appeal, with References to Record.**—The date of the affirmance by the Supreme Court of Ohio of the

judgment of the Court of Appeals repeating that rendered by the Court of Common Pleas of Cuyahoga County, Ohio, herein, is March 27, 1929 (Record, not yet printed, p. 18); and the date of the overruling by the Supreme Court of Ohio of appellant's motion to vacate said judgment of affirmance and to substitute therefor an entry of judgment for plaintiff in error, appellant here, is June 5, 1929 (R. 18); both of which judgments are sought to be reviewed here. The date on which application for the appeal was presented and allowed is June 13, 1929 (R. 18).

(c) **Showing that the Nature of the Case and of the Rulings Below are within said Jurisdictional Provisions, with References to Record.**—The suit below challenged the validity of the Park District Acts (General Code of Ohio, Secs. 2976-1 to 2976-10i, inclusive), passed by the General Assembly March 6, 1917 (107 Ohio Laws, 65), and April 9, 1919 (108 id., Part 2, 1097), upon the ground, among others, that they denied to the taxpayers of said district, including the relator, the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Federal Constitution (R. 72, 78) and were otherwise unconstitutional (R. 72, 77), in that said acts purport to delegate to the Probate Judge of any county in Ohio the power of creating and enlarging such park district within and beyond his county and of appointing commissioners of such district (R. 72, 74), and further delegate to such non-elective commissioners discretionary power to levy taxes (R. 73, 75), to appoint a constabulary and to enact penal measures effective within and adjacent to such districts (R. 76), and also subject the taxpayers within the district to the financial burden of acquiring and maintaining lands outside of it (R. 75).

The case was first tried in the Court of Common Pleas and judgment on the pleadings rendered for defendants. On appeal to the Court of Appeals it was then tried *de novo*, and judgment again rendered for defendants, with separate

findings of fact and conclusions of law reciting that said sections of the General Code "are in all respects valid and not in violation of the Constitution of Ohio or the Constitution of the United States," and on error in the Supreme Court of Ohio a judgment of affirmance was entered, the journal entry, however, reciting (R. 19) that

> "it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, *JJ.*) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, *C.J.* and Kinkade, *J.*) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed."

Thereupon the appellant, as plaintiff in error in said Supreme Court of Ohio, filed there an application for a rehearing and motion (which said court overruled) to vacate said judgment of affirmance and for judgment for plaintiff in error, etc., upon the grounds, among others, of repugnancy of the said provision in Section 2 of Article IV of the Constitution of Ohio, in its practical operation and effect as illustrated in this case (and elaborated in that of *Board of Education of Columbus v. Columbus*, 118 Ohio State, 295, at pages 296, 298 and 306, showing how, by the same vote of the same judges at the same time in different cases involving the validity of the same statute, such statute is arbitrarily and capriciously made valid in some parts and invalid in other parts of the state), to and in conflict with the Constitution of the United States, including the equal protection and due process clauses of Section 1 of the

Fourteenth Amendment and the provision relating to republican form of government in Section 4 of Article IV, as follows (R. 28):

> "*Fourthly.* The judgment here denies to plaintiff in error, in the construing of this Act and the disposing of this cause, the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, which the amended petition expressly invoked in respect to the unequal operation of the Act in subjecting (among its other inequalities) the taxpayers within the district to the financial burden of acquiring and maintaining lands outside of it, and the same constitutional guaranty is now further invaded by the rendering of judgment against this plaintiff in error by the concurrence of a minority—less than a quorum—of this Court upon said Federal question, and by the Court's failing to state in its journal entry that such Federal question was presented and was so adjudicated by such minority.
>
> "*Fifthly.* The entering by this Court of a minority judgment upholding the constitutionality of a law which the judgment of the Court of Appeals has sustained, when a contrary judgment by another Court of Appeals may at the same time be affirmed here by the same vote, is a peculiarity of the Ohio Constitution and of the judicial structure of this State, which necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution above cited, and by Section 4 of Article 4 of the same instrument which assures to each state a republican form of government."

See "Statement of Points to be Relied on by Appellant," heretofore filed herein.

(d) **Citation of Cases Sustaining the Jurisdiction.**

Mallett v. North Carolina, 181 U. S. 589;
Truax v. Corrigan, 257 U. S., 312;
Bowman (*Missouri*) *v. Lewis,* 101 U. S., 22;

Gunn v. Berry, 15 Wallace, 610;
People v. W. U. Tel. Co., 70 Colo., 90;
California Adjustment Col. v. Atchison, etc., R. R. Co., 179 Cal., 140;
Meriwether v. Garrett, 102 U. S., 472, at p. 515;
Michigan Cen. R. R. v. Powers, 201 U. S., 245, 294;
Clapp v. Ely, 27 N. J. L., 622;
Butler v. Perry, 240 U. S., 328, at p. 333;
American Land Co. v. Zeiss, 219 U. S., 47, at p. 66.

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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 238

STATE OF OHIO EX REL.
PAULINE WADSWORTH,
Appellant,

VS.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY,
THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN
PARK DISTRICT IN CLEVELAND, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 237

STATE OF OHIO EX REL.
E. H. BRYANT,
Appellant,

vs.

AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY,
F. A. SEIBERLING, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

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Argument:

1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States 14

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In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 238

STATE OF OHIO EX REL.
PAULINE WADSWORTH,
Appellant,

vs.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY,
THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN
PARK DISTRICT IN CLEVELAND, ET AL.,
Appellees.

Appeal From the Supreme Court of the State of Ohio.

BRIEF FOR APPELLANT.

OFFICIAL REPORT OF OPINION BELOW.

The official report of the opinion of the Supreme Court of Ohio will be found in 120 Ohio St., 464, (advance sheets, subject to change in pagination when complete volume is issued); 166 N. E. 407 (advance sheets, No. for June 18, 1929,) and is entitled the *State ex rel. Bryant vs. Akron Metropolitan Park District for Summit County, et al.,* the *State ex rel. Wadsworth, a Taxpayer, vs. Zangerle, Auditor, et al.,* Nos. 21324 and 21336, decided March 27, 1929, and printed in the Ohio State Bar Association Reports, Volume II, No. 11, for June 11, 1929; also in the Law Bulletin and Reporter, Volume XXIX, Number for June 17, 1929, page

277. In each of these local law weeklies appears also the report of the same court's decision in *Shook vs. Mahoning Valley Sanitary District,* 120 Ohio St., 449 (advance sheets); 166 N. E. 415 (advance sheets, No. for June 18, 1929), which was decided at the same time and involves similar constitutional questions. The opinion of the Supreme Court of Ohio in the present case appears also in the printed transcript of record at pages 13 to 32.

JURISDICTION OF THIS COURT.

Paragraph 1 of Rule 12 having already been complied with by the filing of "Appellant's Statement of Basis of Jurisdiction of this Court," which was unopposed and upon which the question of jurisdiction was submitted on October 14, and the jurisdiction sustained on October 28, 1929, a repetition here of the contents of said statement is dispensed with under Rule 27.

STATEMENT OF CASE.

The material facts in respect to the subject matter and history of this case, with references to the printed record, are set out below.

This is one of two parallel cases (see No. 237, *State of Ohio ex rel. E. H. Bryant, Appellant, vs. Akron Metropolitan Park District, et al.*) which are here on appeal from the Supreme Court of Ohio. Both appellants were plaintiffs in the Common Pleas Courts. In the Courts of Appeals, the appellant in No. 237 was plaintiff in error, and in the present case, No. 238, the appellant here was appellant there. In the Supreme Court of Ohio, each was plaintiff in error. In each case the relator, a taxpayer, sued in the Court of Common Pleas of the proper county for an injunction on constitutional grounds, both State and Federal, to enjoin the Park Board of the (Cleveland or Akron)

Metropolitan Park District, together with the auditor of the county where such Board's revenues and disbursements are handled, from making further expenditures of public money, from incurring any obligation requiring such expenditures, and from the taking of other official action in behalf of the district (*i. e.*, the Akron Metropolitan Park District for Summit County in No. 237, and the Metropolitan Park District in Cleveland, Cuyahoga County, in the instant case, No. 238); for a decree declaring the Ohio Park District Act unconstitutional; and for other specific and general equitable relief. In Ohio it is settled by *Green vs. The State Civil Service Commission, et al.*, 90 Ohio St., 252, that a taxpayer may maintain such an action for injunction against a public commission, board or officer.

Both Districts were organized under the Ohio Park District Act, General Code Sections 2976-1 *et seq.* The original act, with amendments, is herein set out in Appendix A. The Cleveland District originally comprised all of Cuyahoga County except Bay Village (R. 44); but with subsequent annexations it now (R. 44, 54) embraces the whole of Cuyahoga County together with the Township of Hinckley in Medina County (R. 42), and it has furthermore acquired and holds land in Lake County which is not annexed to but lies outside of the District (R. 42, 54). The Akron District comprises all of Summit County except the Township of Twinsburg and the Village of Hudson.

The mode of organization of park districts prescribed by the Act contemplates the presentation to the probate judge of a freeholder's petition for and a map of the proposed district, indicating the name and boundaries thereof, which district shall not divide any township or municipal corporation. After notice and hearing, such judge shall, with or without diminishing or altering, but without enlarging, the suggested boundaries, enter an order creating such district, provided he shall find the proceed-

ings regular and that "the creation of such district will be conducive of the general welfare"; and shall then appoint three park commissioners, who are empowered by the Act to levy taxes, define misdemeanors, appoint police officers, etc. In each of these cases such characteristic features of the Park Board Laws are charged to contravene the Constitutions both of Ohio and of the United States,—the federal aspects of such averments in the present case, No. 238, being cited and discussed below.

The lower state courts decided both cases for the defendants, but in each the Ohio Supreme Court divided, two for and five against the constitutionality of the Act (R. 7). Under the peculiar provisions of Section 2 of Article IV of the Ohio Constitution, hereinafter quoted, the minority opinion controlled the court's decision whereby the judgments of the lower courts in both cases were affirmed. As explained below, the decisions of the lower courts upon the constitutional questions were themselves controlled under the rule of *stare decisis* by the prior decision of the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* 108 Ohio St., 497, the syllabus of which (as being officially declaratory in Ohio of the adjudicated law) did not stop with passing upon the particular constitutional questions presented and considered therein, but upheld generally the constitutionality of this Park Board Act.

The present case, No. 238, was appealed (R. 36) from the Common Pleas Court of Cuyahoga County to the Court of Appeals, where a trial *de novo* resulted in "Findings of Fact" (R. 53-58), along with which (R. 58, 59),

> "for Conclusions of Law, the court finds, upon the issues joined, for the defendants; that the said Sections 2976-1 to 2976-i of the General Code of Ohio, are in all respects valid and not in violation of the Constitution of Ohio or the Constitution of the United States or any provision thereof, and that the proceedings had by the

> defendants are in all respects legal and valid, and judgment dismissing the plaintiff in error's amended petition is entered"—

which is the judgment affirmed by the Ohio Supreme Court. The cause was taken thither by petition in error, alleging *inter alia* (R. 33):

> "2. That the court erroneously decided the constitutional questions involved adversely to this plaintiff in error."

There, on intimation to counsel for the Park Board during argument, the constitutional questions were further briefed, and *amici curiae* having also filed briefs on each side (R. 6), the court *sua sponte* ordered a reargument, after which the judgment of the Court of Appeals was finally affirmed (R. 6); but the affirmance being qualified by the disclosure that a majority comprising five of the seven judges considered the Act to be unconstitutional (R. 7), this appellant filed an application for a rehearing, which the court denied (R. 6, 7), and also filed and the court overruled (R. 6, 7) a motion to vacate the judgment and for judgment for plaintiff in error (R. 8-12), alleging *inter alia*, besides the previously urged constitutional objections (R. 39-44) to the Park Board statutes as hereinafter discussed, a further constitutional objection then and not until then arising or available, (*cf. Saunders vs. Shaw, et al.*, 244 U. S. 317, 320), viz., that the affirmance with such majority dissent (together with the provision of Article IV, Section 2 of the Ohio Constitution purporting to warrant such procedure in some but not in all cases of such division of opinion) itself violates various paramount provisions in the Constitutions both of Ohio and of the United States (R. 12); namely, as to the latter, the Equality Clause of Section 1 of the Fourteenth Amendment (R. 12), the guaranty of republican state government in Section 4 of Article IV (R. 12), and the mandate within and concerning the

instrument itself (Article VI) that it is the supreme law of the land (R. 12) and that the judges of every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. Appellant's motion to vacate concluded by alleging accordingly that this recital of constitutional objections to the entering of such minority judgment sustaining the Park Board Act solely by force of said Section 2 of Article IV of the Ohio Constitution, with its capricious and unequal operation, its arbitrary and unrepublican rule of adjudication, and its silencing of the majority judges concerning the Constitution whose supremacy they are bound by its terms to declare (R. 12),

> "applies not only to the determining of the repugnance of the Act to the Ohio Constitution, but *a fortiori* to the testing of such act under the Constitution of the United States which may and must be adjudicated by a majority of this Court."

That provision of the Ohio Constitution, Article IV, Section 2, which is here referred to, is as follows:

> "No law shall be held unconstitutional and void by the supreme court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

The procedural history of the *Akron* case, No. 237, is the same as that of the instant case, No. 238, save that in the former the Common Pleas judgment was rendered upon the pleadings and not, as in the Cleveland case, after full trial of issues of fact in respect to alleged maladministration by the Board itself; and the review in the Court of Appeals was by proceeding in error and not, as in No. 238, by appeal and trial *de novo*. In each case, in so far as the constitutional issues were concerned, the judges of the lower state courts, following the above cited previous decision of

the Ohio Supreme Court in *McNab vs. Board of Park Commissioners,* (108 O. S. 497) and therefore declaring the Park Board Act to be constitutional under the rule of *stare decisis,* could, of course, give no effect to opposing views. This in turn arbitrarily and by mere chance subjected the dissenting majority of the judges of the State Supreme Court to the distinct and different but equally compelling restraint which the Court of Appeals' judgment, sustaining the law, imposed upon their freedom of decision under the above quoted provision of the State Constitution (Article IV, Section 2). Thus, the prior action of either court appears to have constrained the action of the other. But as to the original basis of this dilemma, the opinion by Marshall, *C.J.,* expressing the views of the prevailing minority of the Supreme Court (and in this respect of the majority also), concedes that its earlier decision in *McNab vs. Board of Park Commissioners,* cited *supra,* broad as was its affirmation of the constitutionality of the Park Board Law, should not be treated as conclusive of these suits in view of the new constitutional questions therein first presented; for he says (R. 19):

> "While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made."

The arbitrary results of the operation of Section 2 of Article IV of the Ohio Constitution in making those statute laws of a general nature (which are required by Section 26 of Article II to be of uniform operation throughout the state,) constitutional and valid in some appellate districts, unconstitutional and void in other appellate districts, and of uncertain operation in all other parts of the State of Ohio, are set forth in *Board of Education vs. Columbus,* 118 Ohio St., 295, at pages 301 to 307, and are hereinafter discussed.

In addition to the constitutional question above outlined which arises out of the minority judgment rendered by the Ohio Supreme Court, and in particularizing the general averment of unconstitutionality of the original and amendatory acts comprising the Park Board Law (R. 43), "all of which provisions violate the provisions of the constitutions herein set forth" both State and Federal, the amended petition herein specially raises Federal questions (R. 40-44) on six salient features of said law which are deemed repugnant to various sections of the Federal Constitution, including *inter alia* the Due Process (R. 40) and the Equality (R. 44) Clauses of the Fourteenth Amendment, and which may be summarized as follows, viz.:

1. Section 4 (107 Ohio Laws 65; General Code Section 2976-4) empowering the probate judge to *mold* the confines of the territory of the proposed district as petitioned for and to erect the same into a park district, "if he finds the creation of such district will be conducive to the *general welfare.*"

2. Sections 5 and 6 (107 Ohio Laws 66; G. C. 2976-5 and 2976-6) providing for the *appointment* by such judge of three persons—whose qualifications are not prescribed—to constitute the board of commissioners of such park district, as a body corporate and politic;

3. Section 7 (107 Ohio Laws 66; G. C. 2976-7) authorizing said board to appropriate lands within and without said district;

4. Sections 10 and 10i (107 Ohio Laws 67; G. C. 2976-10; and 108 Ohio Laws, Part 2, 1099) authorizing such appointed board to *levy taxes* on both real and personal property up to one-tenth mill annually without popular vote; an additional one-tenth mill annually through such period of years as the electors may authorize; and such further one-tenth mill annual levies to continue over periods of years as may be so voted at not less than yearly intervals;

5. Sections 10g and 10h (108 Ohio Laws, Part 2, 1098; G. C. 2976, 10g; and 108 Ohio Laws, Part 2, 1099; G. C. 2976, 10g) enabling such appointed board to make by-laws, rules and regulations, the violation of which shall be *misdemeanors*, and to clothe its designated employees with "all the powers of *police* officers within and *adjacent* to the lands under the control and jurisdiction of the board";

6. Sections 7 and 10d (107 Ohio Laws 66; G. C. 2976-7; and 108 Ohio Laws, Part 2, 1098; G. C. 2976-10d) authorizing the probate judge to make *annexations* to the district of lands within or *without the county* of its origin, and thus to extend over such annexed territory the exercise of the aforesaid powers therein, including the park board's acquisition by appropriation or otherwise, and the developing, improving and policing of lands *outside* of such district and within or without such county, at the cost and expense of the taxpayers *within* the district, and "in such manner as the commissioners may deem conducive to the general welfare."

Other inequalities in the operation of the Park Board Law result, if, as has occurred, a large part of the land in any existing township, school district, or other taxing subdivision, is acquired by the Board and thereby becomes exempt from taxation so as to overburden the residue; or if the budget commissioners of different counties into which a park district extends, reduce in varying degrees the rate of its unvoted tax levy.

Specifically the amended petition herein avers, in regard to the authority of the probate judge of Cuyahoga County to organize the Board of Park Commissioners of the Metropolitan Park District in Cleveland, that (R. 40) no "order or decree can be entered by said court that is valid under the due process of law provided in Section 1, Article XIV of the Constitution of the United States and

the fundamental law of Ohio," because, (a), the Park Board Law purports to authorize such judge to fix the confines of the district, whereas "the determination of what the geographical boundaries of a territory shall be is a political or legislative question, which cannot be delegated to the judiciary by the General Assembly"; (b), the Park Board Law purports to authorize such judge to appoint three commissioners empowered by the Act "to levy real and personal property taxes in an amount not in excess of one-tenth (1/10) of a mill upon each dollar of the assessed value of the property in the district in any one year" (R. 40); (c), said law provides for the "delegation to said defendants, Park Board Commissioners, of the power to enact penal measures, and exercise police powers and clothe all their employees with powers of police officers" (R. 42); and (d), because "said law cannot have uniform operation throughout the state, in violation of Section 26 of Article II of the Constitution of Ohio"; and the plaintiff and those whom she represents are, therefore, "denied the equal protection of the law guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution" (R. 44).

SPECIFICATION OF ASSIGNED ERRORS.

In appellant's "Assignment of Errors" (R. 4, 5), and in the specification thereof contained in the "Statement of Points to be Relied on" (R. 59-61), the first and second errors of the Supreme Court of Ohio complained of are in finding and deciding (R. 4)—

> "1. That, 'it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ.) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional

provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed.'

"2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void,' does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to 'deny to any person within its jurisdiction the equal protection of the laws.' "

The two errors thus assigned—mention of the third and last one being deferred until later—are further specified in the "Statement of Points," filed in this Court as follows (R. 59, 60):

"Point One. The Park District Act (General Code of Ohio, Sections 2976-4 *et seq.*) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that 'No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void'; and on motion to vacate this judgment and substitute a judgment of reversal pursuant to the opinion of the ma-

jority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be 'the supreme law of the land' and that 'the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding,' the Supreme Court of Ohio erred in refusing so to do.

"Point Two. This peculiarity in the judicial structure of the State of Ohio as illustrated in *Board of Education vs. Columbus,* 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things—but solely from the lottery of discordant inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because, whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV of the same instrument which assures to each state a republican form of government."

The third and last assignment of error is that the Supreme Court of Ohio erred in finding and deciding (R. 4, 5)—

"3. That the 'Park District Act' of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive (107 Ohio Laws, pages 65-69) and the amendments thereto, Sections 2976-1 to 2976-7, and the supple-

mental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that neither said act nor any of said sections, by delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state."

This third assigned error is further specified in the "Statement of Points," as follows (R. 60, 61):

"Point Three. On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment, in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Section 4 of Article IV in delegating to non-elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes."

ARGUMENT.

1. The Supreme Court of Ohio erred in refusing to vacate its minority judgment entered by requirement of Section 2, Article IV of the Constitution of that State and to find such requirement inoperative as being repugnant to Section 4 of Article IV, Article VI, and the XIV Amendment of the Constitution of the United States.

It is, of course, well settled that the equal protection of the laws is not denied by any diversity in the jurisdiction of the several courts of a state as to subject matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases and under like circumstances to resort to them for redress. *Bowman (Missouri) vs. Lewis,* 101 U. S. 22; *Mallett vs. North Carolina,* 181 U. S. 589. But assuming that the constitution or laws of a state may vary the remedies afforded by its courts at the discretion of the law-making power, and may even take away their right to administer generally certain kinds of remedies, the Equality Clause forbids that the state shall deny such relief to one person while granting it to another under like circumstances and in the same territorial jurisdiction. *Truax vs. Corrigan,* 257 U. S. 312, 331-5. The equality of rights is also a principle of republicanism, and although in the maintenance of such form of government the duty was originally assumed by the states where it still remains, the obligation rests upon the United States to see that the states do not deny that right. *United States vs. Cruikshank, et al.,* 92 U. S. 542, 545; U. S. Const., Art. 4, §4. Such Federal supervision is exercisable by Congress in the admission of new states. Thereafter a state enjoys wide discretion to vary in detail its frame of government. But where the innovation is contrived or necessarily operates to destroy or impair the fundamental rights of persons

within the state's jurisdiction, this guaranty, overlapped and supplemented as it is by the Due Process and Equal Protection clauses of the Fourteenth Amendment, contributes with them to form the bulwark of our liberties.

No feature of the general framework of state government throughout the United States is more constant or characteristic than the provision made in every constitution for a single reviewing court at the apex of the state's judicial structure. (See the summary of such provisions set forth in 15 *Corpus Juris* at pages 1026 to 1127.) The invaluable function of such a tribunal is to secure the unity of the unwritten law of the state and uniformity in the judicial construction of its written law. To accomplish this end without congestion, the right of review in the state supreme court is generally restricted in various ways. Perhaps the commonest mode is to refuse, or to regulate and limit, resort thereto as of right except when a constitutional question is involved or a question on which coordinate lower courts have created conflicting precedents. The revision of the Constitution of Ohio in 1912 embodied measures of this kind for the relief of the Supreme Court, but disclosed at the same time a jealous distrust of one of its main reasons for being. That Court's power to declare a law unconstitutional contrary to the judgment of the next lower court was heavily handicapped through the device of a virtual veto exercisable by a small and shifting minority of its members.

As often happens unexpectedly from a slight interference with any natural order, startling and baleful results have ensued upon this change. Uniformity of construction and consequent operation of the written law no longer prevails throughout the State of Ohio. (See *Board of Education vs. Columbus*, 118 O. S. 295, cited *supra*, and discussed below.) By force of this amendment of Article IV, Section 2, of its Constitution, that State thus denies to

those within its jurisdiction the equal protection of the laws. Such inequality is no mere incident to the normal working of a generally established system, such as judgments of affirmance consequent upon an equal division of the judges sitting. It is due rather to a deliberate experiment with an unprecedented and impracticable departure from the type of judicature which obtains in all the states of the Union with but one other exception, and which is an outstanding and durable feature of the republican form of government enjoined upon the states and guaranteed to their inhabitants.

It will be argued that the logic of this contention would require not only that every state must provide a single court of last resort, as each in fact has ever done, but also that every litigant shall have access thereto for a review of his cause, as few, if any, states now unrestrictedly permit. The answer to this objection is found in the principles of classification which are defined and limited in the three decisions of this Court above cited, viz., *Bowman (Missouri) vs. Lewis, Mallett vs. North Carolina,* and *Truax vs. Corrigan.* The Federal Constitution does not require statewide uniformity of state laws or of prescribed or permitted judicial procedure, nor forbid the adaptation thereof to diverse conditions and places. But it does demand that any classification of laws or procedure for different parts of the state, or to meet varying conditions in all parts of the state, shall have a reasonable basis and shall not be fitful or fortuitous in its application or operation. If by provision in a state constitution a supreme court is created and made accessible to litigants, its jurisdiction cannot lawfully be so molded, under pretense of classification, as to promote or probably produce contrariety of decision of identical questions. A bench may indeed change its mind, but so long as it remains of the same mind it ought not to be obliged to render contradictory judgments in respect to

the construction and application of one and the same law. Classification, moreover, is a legislative function; but in Ohio, without any exercise thereof by the General Assembly, a statute enacted by it becomes, by inconsistent adjudication under this constitutional constraint, law in one district, no-law in another, and uncertain law in the rest, with haphazard and chaotic heed paid here to the legislative will and there to applicable constitutional limitations.

Though not all this has yet happened to the Park Board Law, the minority judgment in the present case was in fact the direct result of this vice in the Ohio Constitution. Such result is peculiarly flagrant because, as explained above in the Statement, the controlling decision below by the Court of Appeals was itself determined by a prior decision of the Supreme Court, the official syllabus of which the latter Court now concedes to have been too sweeping. And the majority view of the Ohio Supreme Court now—henceforth a license and invitation for the lower courts to follow (*Board of Education vs. Columbus, supra,* citing at pp. 299-301, *Hertz vs. Woodman,* 218 U. S. 205,)—will next time become its effectual judgment. The appellant here is clearly and substantially aggrieved; the contention now presented was seasonably urged below; it is immaterial that there is as yet no conflict of decision in respect to this Act; and the proposition of law embraced in the point now argued is justiciable and not moot or premature. *State ex rel. Pogue vs. Groom,* 91 O. S., 1, and p. 8 of the opinion by Donahue, J., (afterwards a judge of the U. S. C. C., 6th Circ.); 12 C. J. 786, note 78.

The anomaly of this provision of the Constitution of Ohio, which defeats the majority opinions of the judges of its Supreme Court, as well as the flagrant inequality of its operation, will best be explained by quoting excerpts from the opinion in *Board of Education vs. Columbus,* 118 Ohio St., 295 (cited *supra*), wherein that Court for the second

time passed upon the constitutionality of Section 3963 of the General Code of that State, requiring that "no charge shall be made by a city or village, or by the water works department thereof, for supplying water for * * * the use of the public school buildings in such city or village." In the opinion by Marshall, *C.J.*, (who delivered the prevailing minority opinion in the present case, and with whom then as now Kinkade, *J.*, concurred,) he says, at page 296:

> "The controversy is in every essential detail identical with the case of *City of East Cleveland vs. Board of Education of City School District of East Cleveland*, 112 Ohio St., 607, 148 N. E., 350, decided May 26, 1925. There has been no change in the personnel of this court since that decision. That decision was rendered by two members of this court; the other five judges dissenting. Two judges were able to render a judgment under authority of a provision in Section 2 of Article IV of the Ohio Constitution, which provides:
>
> " 'No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void.' "

Again at page 306 the Chief Justice further says that

> "a cause originating in the probate court might involve the constitutionality of a statute, and the statute might be declared unconstitutional by the probate court, the Common Pleas Court on error, and by one of the judges of the Court of Appeals, and by five judges of the Supreme Court, a total of eight judges, and yet the statute would be held to be constitutional by the concurrence of two judges of the Court of Appeals, declaring its constitutionality, and affirmed by two judges of the Supreme Court, a total of four."

The unequal operation of the laws of the State of Ohio in the application of this provision of the Constitution of Ohio is clearly disclosed at page 298 of the opinion:

"It has always been recognized as a sound theory that the most important function of courts of last resort is to render uniform the conflicting decisions of inferior tribunals within the jurisdiction of such courts, but the practical operation of this theory is destroyed in the State of Ohio, so far as the constitutionality of statutes and ordinances is concerned, by the constitutional provisions above referred to. The best possible illustration of that fact is found in the decision of the instant case and the decision of the *East Cleveland* case. In the Second Appellate District, Section 3963 is unconstitutional and void, and must be so treated by all the municipalities of that district. In the Eighth and Ninth Appellate Districts the statute is valid, and must be so administered. In the other six appellate districts, municipalities may not know whether that section is valid and applicable to municipalities within their jurisdictions until the question has been submitted to the various Courts of Appeals of those districts, but all municipalities in those districts may be assured that whatever judgments are rendered by their respective Courts of Appeals will be affirmed by this court until such time as either the constitutional provision is abrogated or changes occur in the personnel of this court. It would be difficult to describe or even imagine a more deplorable situation."

We respectfully request this Court to read the entire opinion in the above case.

The rule of *Missouri vs. Lewis, supra,* and of *Mallett vs. North Carolina, supra,* is to be distinguished from the principle applicable to the present case, in that the diversity of provisions for judicial review in different parts of a state may presumably be warranted by the existence of a basis of reasonable geographical classification. Here, however, there is neither geographical nor other legitimate ground of classification to sustain the eccentric and irrational operation of Section 2 of Article IV of the Ohio Constitution.

Certainly the determination of the Federal as distinguished from the State Constitutional questions concerning the validity of the Park Board Law by a minority vote of the members of the Supreme Court of Ohio, pursuant to said section, brings such section into direct conflict with Article VI of the Federal Constitution which provides that that instrument and the treaties and laws made under it are the supreme law of the land, and commands that "the *judges* of every state shall be bound thereby, anything in the *constitution* or laws of any state to the contrary notwithstanding." Fortunately this Court can independently reconsider those questions. Not generally so, however, of questions arising under the State Constitution alone. Of these the State Supreme Court is, in general, and when permitted to function effectively, the final arbiter. But since that tribunal's discharge of this function is controlled by the minority-rule limitation in the State Constitution, such limitation, being incompatible with the Equal Protection Clause, must give way and the judgment below be reversed.

In *Railroad Co. vs. Commissioners,* 1 Ohio St., 77, at page 81 it is said:

> "that it is the right, and consequently the duty, of the judicial tribunals to determine whether a legislative act drawn in question in a suit pending before them is opposed to the Constitution of the United States or of this State, and if so found, to treat it as a nullity."

It is also provided in the Constitution of Ohio, Article I, Section 16, that

> "all courts shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of the law and justice administered without denial or delay."

And in Section 2 of Article IV, it is provided that the Supreme Court of Ohio

> "shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and

appellate jurisdiction in all cases involving questions arising under the Constitution of the United States or of this state * * *."

Such provisions must either wholly nullify, or else yield to, the later clause in the same Section 2 that is here complained of. Thus the enforcement of the latter defeats Section 26 of Article II, which requires that "all laws of a general nature shall have a uniform operation throughout the State." These self-contradictions in the Ohio Constitution are exemplified and discussed in *Board of Education v. Columbus, supra,* wherein the Court concludes that it is itself impotent to correct them against the adverse vote of any two of its members.

But assuming that all these irreconcilable provisions are alike binding upon all the judges of that Court, the mischief-making limitation is the one that should yield. If a key to the deadlock can not be found in the State Constitution, one lies at hand in that of the United States. This solution was duly invoked in the court below, and it erred in failing to enforce, by majority rule, the protection claimed under that instrument—by which "the judges in every state shall be bound," "anything in the Constitution or laws of any state to the contrary notwithstanding,"—and in failing to hold void this clause in the Constitution of Ohio, which is not only the negation of due process and a denial of equal protection, but when engrafted on the frame of any government is destructive of its republican form.

A striking parallel to such application of these basic limitations on the power of a state thus to hobble its supreme judges is found in the commentary of a learned historian of this Court upon an abortive proposal of the same device a century ago to paralyze Your Honors' power to declare state laws repugnant to the Federal Constitution. In the decade 1823 to 1833 while Congress was debating various measures to restrict or nullify the power of the

United States Supreme Court to hold a state law repugnant to the Federal Constitution, one of the means to that end, proposed in 1824 and again in 1829, is described in Warren's "The Supreme Court in United States History" at pages 124-6 (and see also pp. 177-8) as follows, including footnotes:

> "Since many persons in the country believed that strong arguments could be made in behalf of such a measure, a bill was reported from the Committee on Judiciary by Senator Martin Van Buren of New York, on March 11, 1824, providing that no law of any of the States should be rendered invalid without the concurrence of five of the seven Judges. The bill, however, was laid upon the table. In the House, similar measures were proposed by Robert P. Letcher and Thomas Metcalfe, both of Kentucky. That this reform in the Judiciary system seemed, superficially, to have much to commend it is seen from the fact that Webster wrote to Judge Story, informing him that Judge Todd had told him it would give great satisfaction in the West, and asking him if he saw any evil in such a provision. Later, however, Webster decided to oppose the change, although he was willing to go so far as to offer a substitute to provide that, in cases involving the validity of a State statute or Constitution, 'no judgment shall be pronounced or rendered until a majority of all the Justices of the said Court legally competent to sit in the cause shall concur in the opinion, either in favor of or against the validity thereof, and until such concurrence such suit shall be continued.' There were two very vital objections to this requirement of a concurrence of five of the seven Judges, which seem to have been entirely overlooked in the debate. In the first place, it would have worked with singular injustice upon litigants in the Federal Circuit Courts; for, while an appeal to the Supreme Court from a State Court decision was only possible in a case where the latter had held a State law constitutional, an appeal from a Circuit Court decision was possible, even if that Court

held the State law invalid. An appellant in the Supreme Court in the latter case would find himself in this predicament: if five out of seven Judges concurred in finding the State law invalid, he would lose his appeal; and if only four concurred, the proposed statute would prohibit the Supreme Court from finding the law invalid; hence the decision of the Circuit Court as to invalidity would become final; so that the appellant would lose in either case, and the proposed statute would be of no avail to him. But the fundamental objection to the proposition was that it completely ignored the true function of a judicial tribunal, which was, to hold the scales of justice even and to decide impartially between the parties, the appellant and the appellee both meeting before it on even terms. The proposed statute entirely lost sight of the fact that suits in the Supreme Court involving the validity of State statutes were litigation between individuals and presented questions of the property or personal rights of individuals, and that each litigant was entitled to equal protection. These suits were not impersonal attempts to adjudicate between the Constitution, or the Federal Government, and the State; they were simply adjustment of the respective rights of two persons, one claiming a right under the Constitution, the other under the State law. A Federal statute, therefore, which required an appellant to persuade five out of seven Judges, in order to win, while the appellee in order to prevail had to persuade but three Judges, gave to the appellee in a lawsuit very heavy odds. The parties no longer came into the Court on an equal basis, but with the chances heavily weighted against an appellant—and this was not in consonance with any Anglo-Saxon system of justice."

Thus any court that has jurisdiction to hear, but is unable, except in form, to decide a particular case unless six-sevenths of its membership concur, is not "open to every person," and is unable "to administer justice without denial or delay by due course of law."

Manifestly, too, this restriction upon the Ohio Supreme Court gives to those who there seek to have a law held constitutional, after the Court of Appeals has held it unconstitutional, an advantage over those seeking to procure the reversal of a decision of the Court of Appeals holding a law constitutional; the effect being that in one case the party is defeated unless all but one member of the Supreme Court concur in sustaining his contention, while in the other a majority controls and he prevails. When parties are unable to approach a court upon an equality, equal protection of the laws is manifestly denied to them. It may be unnecessary that any such right of review in the Supreme Court of Ohio should be provided at all so far as the Federal Constitution is concerned. But having been provided by the Constitution of that State as a matter of right in all cases involving constitutional questions, it must be accorded impartially so as to afford the equal protection of equal laws not in form only, but in substance and in fact, and always. In various pronouncements, the judges of that Court are all committed to the proposition that this restriction operates in practice directly contrary to these principles, both upon litigants and upon the laws. The Court erred in not holding accordingly that it contravenes the Equality clause and is hence of no effect.

Judged thus, as it must be, by the actual results of its operation, and viewed in any aspect and from every standpoint, this clause of Section 2 of Article IV of the Constitution of Ohio, rests upon an irrational basis of attempted classification, is repugnant to those provisions of the Federal Constitution which are now invoked to render it inoperative, and is therefore null and void.

In *Green v. Red Cross Medical Service Company*, 232 Ill. 616, at page 619, the opinion of the court, by Cartwright, *J.*, declares:

"We are asked to review the finding of the Appellate Court as to the fact found and incorporated in the judgment of that court by virtue of the provision of section 120 of the Practice Act, which provides that if the Appellate Court shall reverse a judgment of the trial court as the result of finding the facts different from the finding of the trial court, and does not remand the cause, both the facts and law shall stand for review in this court. We have held that provision to be a violation of the constitution, as conferring upon one party to a litigation a special privilege not enjoyed by the other party, and as denying to the party whose rights are limited on the appeal, and who has no right to have the facts reviewed in case they are held against him by the Appellate Court, the equal protection of the laws. *Hecker v. Illinois Central Railroad Co.*, 231 Ill. 574; *Jones v. Chicago, Rock Island and Pacific Railroad Co.*, id. 302."

In the *(Jones)* case last cited, the holding therein is distinguished at p. 319 from that in *Chicago and Alton Railroad Co. v. Fisher*, 141 Ill. 614, where it was "decided that the legislature might properly determine in what class of cases the judgment of the Appellate Court should be final, excepting, of course, the four classes of cases in which an appeal from the Appellate Court to this Court is guaranteed by the constitution."

And in the other *(Hecker)* case, it is held (syl. 3):

"The legislature has power to regulate appeals and writs of error, but it has no right to discriminate between the parties and allow an appeal to one party from an adverse decision and not allow it *upon equal terms* to the other." (Italics ours)

The scope of the doctrine of classification is also discussed at pp. 578-9, with citations of illustrative decisions from different jurisdictions, including *Sanitary District v. Bernstein*, 175 Ill. 215, where the court said:

"Every citizen has an equal right with every other to resort to the courts of justice for the settle-

ment and enforcement of his rights, and it is true that a discrimination between different classes of litigants which is merely arbitrary in its nature is a denial of that right and of the equal protection of the law."

See also:

Funkhouser v. Randolph, 287 Ill. 94;
Arizona Eastern R. R. Co. v. Head, 26 Ariz. 259, syl. 4;
Clapp v. Ely, 27 N. J. L. 555, 620-1, 622-4.

2. The Ohio Park Board Law, General Code Sections 2976-1 to 2976-10i, is repugnant to the Due Process and Equal Protection clauses of the XIV Amendment, Sec. 1, and to the guaranty concerning state government in Sec. 4, Article IV of the Federal Constitution,—

(A) *in delegating the legislative power to the probate judge of a county (a) to create upon the application of self-constituted petitioners, a park district on finding it "conducive to the general welfare"; (b) to mold its boundaries at his (limited) discretion; (c) to create a board of three park commissioners, with no limitation as to citizenship, residence, or other qualification, and deriving their office from his appointment and not by election, for the exercise at their discretion of important powers of government within and beyond such district; and (d) to create, on further petitions, by subsequent annexations, an indefinite expansion of such district within and beyond the county and through any number of counties,—jurisdiction for the latter purpose, when found to be "conducive to the general welfare," being in the probate judge of the county in which such annexed territory lies;*

(B) *in delegating to such non-elected park commissioners the legislative power (a) to define misdemeanors within and adjacent to such district, and within and adjacent to any territory acquired outside thereof, and to*

clothe their agents with power to make arrests in all such places; (b) to levy, at discretion within a maximum limit, upon all personal and real property within such district, general taxes, which in no sense purport to be imposed or apportioned according to benefits; (c) to acquire lands without as well as within such district; (d) to exercise therefor the power of eminent domain; (e) to visit the cost of acquiring lands without such district upon the taxpayers within it; and (f) to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare"; and

(C) *in burdening the taxpayers of the district unequally in sundry ways.*

Unlike *Fallbrook Irrigation District v. Bradley,* 164 U. S. 112, and other similar decisions of this Court, this suit involves a kind of district which is formed for a public purpose more general and indefinite than the construction and maintenance of one or more local public improvements for the special benefit of the lands or inhabitants of the included areas. The legislature in enacting the Park Board Law defined no fixed or determinate undertaking to be accomplished by the exercise of prescribed powers and through agents clothed with appropriate administrative authority limited to that end. The Law is merely an enabling act—not mandatory but permissive.

The "Conservation" Amendment of 1912 to the Ohio Constitution provides (Art. II, Sec. 36):

> "Laws may be passed to encourage forestry, and to that end areas devoted exclusively to forestry may be exempted, in whole or in part, from taxation. Laws may also be passed to provide for converting into forest reserves such lands or parts of lands as have been or may be forfeited to the state, and to authorize the acquiring of other lands for that purpose; also to pro-

vide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands and the development and regulation of water power and the formation of drainage and conservation districts; and to provide for the regulation of methods of mining, measuring and marketing coal, oil, gas and all other minerals."

The Park Districts Act provides (G. C. Sec. 2976-1):

"In order to encourage forestry, to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. * * *"

The same Act further provides (G. C. Sec. 2976-7):

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. * * *"

The language of the Act thus paraphrases Article II, Section 2 of the State Constitution. The purpose defined in that section is a state purpose—"for converting into forest reserves lands forfeited to the state," the "acquiring of other lands for that purpose," and the "conservation of the natural resources of the state." But the Act in the last clause above quoted goes on to particularize means for realizing the purpose of the conservation section of the Constitution. It is avowedly "to those ends" and "in order to" those purposes that the law is enacted. In Ohio a state purpose must be effected at state expense. The cost of a state institution or state improvement must be defrayed by the state and cannot be laid upon the taxpayers

locally. *Wasson, et al. v. Commissioners,* 49 Ohio St. 622. Therefore in order to sustain the constitutionality of the Park Districts Act, which provides for casting the entire burden of cost upon the taxpayers within the district, the *park* purpose is singled out by the Ohio Supreme Court and likened to that of city parks, so as to make it a proper subject of local taxation and of district government. The park districts created under this act are not, however, in any sense municipal corporations or ancillary thereto; neither are they of that familiar type of special district which is formed at the instance of those whose lands will be benefited for the purpose of making or constructing a particular local improvement such as, for example, an irrigation or a reclamation or a flood control project that is undertaken for the special benefit of the included territory. The design of the Conservation Amendment was not to produce any special enhancement of the value or usefulness of surrounding property through the acquiring by the public of submerged or swamp or forest lands and other natural resources of the state and the developing and preserving of the same as forest or other reserves for the general welfare. Nor does the Park Districts Act provide for special benefit improvements or those which serve a particular local interest or add to the value of included or environing lands. The Act discloses no suggestion of this sort. The taxes authorized to be levied by the Park Commissioners are not required to be based on the cost of a prescribed improvement or project or to be levied at a rate prescribed by the legislature or mathematically resulting from criteria prescribed by it. Neither do they purport to be special assessments laid according to actual or presumed benefits. The Act does not admit of any such construction.

We have then the case of a taxing district, the formation of which and the exercise of powers granted to its

commissioners are conditioned upon findings, not made by the legislature but required by it to be made by others, upon the question whether such actions will be "conducive to the general welfare."

Without here attempting to gainsay that this Court, on appeal from a state court of last resort, will not review the decision of any issue which the latter tribunal by its judgment has made to turn upon the law of such state as an independent ground adequate to sustain such judgment, and without now disputing that the Federal Constitution does not forbid the states to delegate their legislative power if thereby the rights of individuals guaranteed by that instrument are not thereby infringed—an "if" that begs the question—there yet remains for the decision of this Court the question *inter alia* whether the Park Districts Act embodies such a delegation of legislative power as to invade the rights so guaranteed.

Returning now to the scrutiny of the Act itself, it will be observed that no duties are enjoined upon the Park Board Commissioners. They may remain entirely inactive. If, however, they choose to act, the field of action is so inclusive that their discretion may properly be said to be limited only by their revenues. And for raising revenue, their discretionary power of general taxation in this populous Park District is very large. They may acquire lands where they please, within or without the district, and may improve them as they think fit. They are really answerable to no one. True, the probate court may, on hearing, remove and replace them, or, on expiration of their terms, appoint others. But he cannot instruct or compel them to pursue any policy or to accomplish any purpose. And once created, the district lives on forever. The probate judge is obliged to create a district on proper petition, provided only he finds its creation will be "conducive to the general welfare." The commissioners, when appointed by

him, may acquire lands, and thereupon they may "develop, improve and protect them as they may deem conducive to to the general welfare."

But the determination of what is "conducive to the general welfare," is clearly a legislative function. The General Assembly of Ohio has thus abdicated its office and function *pro tanto* by delegating to the probate judge and to his appointees the determination of these questions of purely legislative policy. Five of the seven judges of the Supreme Court of Ohio have said in this case that the Park Board Law is unconstitutional. Can it be properly objected that this Court has not the jurisdiction to correct a state's form of government?

The answer is two-fold; first, as the Act was charged to be repugnant to both State and Federal Constitutions, it will be presumed that the five judges deemed it unconstitutional as to both; secondly, that this appellant, suing as she has the right and authority to do in the name of the State of Ohio on her relation as a taxpayer, invokes the guaranty in U. S. Constitution, Section 4, Article IV, of a republican form of government for that state, since its governmental power is being otherwise exercised upon her as such taxpayer. True, this Court has perhaps never answered the first branch of the query, which the opinion in *Michigan Central Railroad Company v. Powers,* 201 U. S. 245, propounds, viz.:

> "Suppose a State by its constitution grants legislative functions to the executive or to the judiciary, what provision of the Federal Constitution will nullify the action? Will the grant work an abandonment of a republican form of government, or be a denial of due process or equal protection?"

Precisely these results, however, do follow upon the more searching point now pressed. Here the offense comes,

not indeed by any grant in the constitution of a state, but by act of its legislature delegating to probate judges its law-making functions of forming park districts if and when they find them "conducive to the general welfare," and delegating to park commissioners appointed by such judges its legislative power to find generally what they shall do that will be "conducive to the general welfare," and specifically conferring upon them the powers to fix tax rates and make levies, to appropriate lands, to frame penal laws, and to create a constabulary. It is surely not a judicial function to determine whether "the creation of such district will be conducive of the general welfare" and to hinge the erection of a new kind of political subdivision of the state upon such finding (G. C. Sec. 2976-4). Nor at least to *appointed* commissioners of such district can *discretion* be lawfully granted to create a policy and program for such district, to take property by eminent domain, to tax those who do not consent to be taxed, and to inculpate and arrest offenders against the edicts of such non-elective board. Security of persons and property from political invasion of the fundamental rights pertaining thereto is the essence of republican government, of due process, and of equal protection of the laws. The power to define what is conducive to the general welfare, the power to appropriate, the power to tax, and the power to define punishable offenses, belong exclusively to the legislative branch of the government—to the general assembly or (by the initiative and referendum) the suffrage of the state; or, where such powers as that of local taxation are vested in subdivisions of the state, to the people thereof or their elected representatives, as in municipal corporations, counties and townships, and other similar districts created in Ohio for special purposes, as well as school districts. Assessments according to benefits are distinguishable and may, of course, be laid according to rules prescribed by

law. But in levying general taxes or defining any legislative policy, the responsibility of those who thus exercise power to those on whom it is exercised, constitutes, through the employment of the elective franchise, the only effective guaranty against the abuse of such power.

It is not contended that, so far as the Federal Constitution is concerned, a state may not clothe administrative officers with power to make and enforce regulations (and perhaps even to raise revenues by taxation) in so far as may be necessary and convenient to accomplish objects specifically defined and required by its laws; as where a statute prescribes an automatic mode of determining the rate of tax which it commands to be levied. But it is contended that, to accomplish undefined and permissive purposes or ends, a state may not empower its non-elected agents to determine what vague policies are "conducive to the general welfare," and when they are so determined to pursue them by such discretionary administrative means. If a state undertakes to govern in that manner, its taxpayers or citizens subjected to such form of rule, may surely invoke in its and their behalf the protection and guaranty of Section 4 of Article IV.

The power of taxation is peculiarly and pre-eminently a legislative power, and one which the legislature cannot delegate, except by specific authority conferred upon it by the Constitution. *Cincinnati v. Roettinger*, 105 O. S. 145, 154; *C. W. & Z. Ry. v. Commissioners*, 1 O. S. 77, 87, opinion by Ranney, *J.*

"The power to vote taxes or assessments must rest in the hands of those liable to pay them." *Campbell v. Park*, 32 O. S. 544, 560. "Taxes being a grant of the people who are taxed, the grant should be made by the immediate representatives of the people." *State v. Toledo*, 48 O. S. 112, 131, 132, 133-4. "The power to tax is one of the highest attributes of sovereignty. * * * Being a sovereign

power, it can only be exercised by the General Assembly, when delegated by the people in the fundamental law." *Mays v. Cincinnati,* 1 O. S. 269, 273. "The power of taxation is one of the sovereign powers of the state; it can only be exercised through the legislature." *Mechanics etc. Bank v. Debolt,* 1 O. S. 591, 600.

The basic principle of free institutions which forbids the delegation of the taxing power, or vesting it in non-elective boards, is generally applied in the other states of the Union. In *City of Little Rock v. Board of Improvements,* 42 Ark. 152, the peculiar provisions of the state constitution were held to authorize the delegation to and exercise by an appointive board of improvement of a city (a municipal corporation suggests *imperium in imperio*) the power to levy *assessments;* yet the general principle is conceded as follows (p. 160):

> "It is certainly true that the power of taxation is a sovereign power, which as a general rule, must be exercised by the legislature of the state; and, even in the absence of express constitutional prohibitions can not be delegated. The principle is considered to underlie all constitutions, as one of those which are taken for granted in all free governments; and so pervade the constitutions that their expression is not deemed essential."

In *Reelfoot Lake Levee District v. Dawson,* 97 Tenn. 151, 34 L. R. A. 725, the court says at page 732:

> "The particular feature of the act that is most objectionable as a delegation of the taxing power is that in which the levee district is authorized to decide for itself what rate of taxation, if any, shall be laid annually, only the maximum rate being prescribed. The legislature, before passing the law, should have determined at least three things: (1) that the purpose in view was a proper purpose for taxation; (2) the annual rate required for the present; and (3) the

rule under which it should be levied. These matters are within the legislative function, and cannot be delegated, in the absence of express authority of the fundamental law. Such questions may be left to counties and incorporated towns, in respect to their own taxes, and within proper limitations; but that is so because the general assembly is expressly empowered to grant them that authority. No other agency or instrumentality of the government can be given such power."

The following are cases applying this rule to facts not unlike those here involved.

Board of Park Commissioners v. Detroit, 28 Mich. 228;
Vallelly v. Board of Park Commissioners, 16 N. D. 25;
Parks v. Board of Commissioners, 61 Fed. 436;
Waterhouse v. Public School, 8 Heisk, 857;
State ex rel. Howe v. Des Moines, 103 Ia. 76;
Schultes v. Eberley, 82 Ala. 242;
State of Montana, ex rel., v. Edwards, 42 Mont. 135.

Citations of like sort could be extended indefinitely. For example, *The Inhabitants of the Township of Barnards v. Allen,* 61 N. J. L. 228, at pages 230, *et seq.,* is a case where the right of taxation is exhaustively considered and traced historically through the long struggle in England to our own birth of freedom. And see also:

Gautier v. Ditmar, 204 N. Y. 20, 26;
State (Lydecker) v. Drainage etc. Commissioners, 41 N. J. L. 154, 156-7.

The delegation of other legislative powers in the formation of special tax districts is condemned, and a statute so offending was held void in the decision (cited also in *Truax v. Corrigan,* to the other point in this case) of *Funkhouser, et al. v. Randolph, et al.,* 287 Ill. 94.

The following are extracts from pages 104 and 105 of the opinion:

> " 'If, after being sufficiently advised and informed in the premises, the court finds that Little Wabash River Drainage District *should be* organized for the purpose of improving said river', (a purely legislative question,) it shall be so ordered, and said findings and judgment are to be final and not questioned in any collateral proceeding."
>
> "What ought to be the boundaries of a special drainage district or what lands ought or should be organized into such a drainage district for drainage purposes is a legislative question and one that cannot be legally determined by a court."
>
> "Unilateral restrictions of this character on the right of review are repugnant to the constitutional provisions guaranteeing every person equal protection of the law. Every citizen has a right, under such guaranties, to insist that his rights of life, liberty and property shall be determined by the same rules which settle and determine similar rights of others."
>
> "The act is void for another reason. It fails to provide for the election of the corporate authorities of such district or their appointment in some mode to which the people of the district have given their assent."

The judgment of the Ohio Supreme Court should be reversed.

Respectfully submitted,

George D. Hile,

Snyder, Henry, Thomsen, Ford & Seagrave,

By Frederick A. Henry,

Attorneys for Appellant.

APPENDIX A.

107 Ohio Laws, Page 65.

AN ACT

To provide for the conservation of natural resources by the creation, development and improvement of park districts, and to repeal sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code.

Be it enacted by the General Assembly of the State of Ohio:

[*Park districts may be created; boundaries thereof.*]

SECTION 1. [*Section 2976-1.*] In order to provide for the preservation of natural resources, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within any county, and the boundaries thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Application to probate judge; contents.*]

SECTION 2. [*Section 2976-2.*] Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district. Such application shall state the name of the proposed district, shall contain an accurate description of the territory to be included, and shall be accompanied with an accurate map or plat thereof.

[*Time of hearing; notice by publication.*]

SECTION 3. [*Section 2976-3.*] Upon the filing of such application the probate judge shall fix a time for the hearing of such application which shall not be less than twenty or more than forty days subsequent to the date of the filing of the application, and shall cause notice of the filing of

such application and the date of hearing thereof to be published in two newspapers of general circulation within such district, if such there be; otherwise such notice shall be published in one newspaper, and if there is no newspaper of general circulation within such proposed district, then he shall cause such notice to be posted in five of the most public places within such proposed district. Such notice shall be published, or posted, for a period of not less than fifteen days prior to the date fixed for the hearing. The hearing may be adjourned from time to time upon good cause shown.

[*Evidence, argument, judgment. Territorial limits may be changed at hearing.*]

SECTION 4. [*Section 2976-4.*] At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application. The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality.

[*Appointment of commissioners; term, oath, bond.*]

SECTION 5. [*Section 2976-5.*] Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years. Before entering upon the performance of his duties, each commissioner shall take an oath to faithfully perform

the duties of his office, and shall give bond for the faithful performance of the duties of his office in the sum of five thousand dollars. Such bond shall be approved by and filed in the office of the county auditor. Such commissioners shall serve without compensation, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

[*Board a body corporate; employment of secretary; records.*]

SECTION 6. [*Section 2976-6.*] Such commissioners shall constitute the board of park commissioners of such district, and such board shall be a body politic and corporate, and shall be capable of suing and of being sued as in this act provided. Such board may employ a secretary and such other employees as may be necessary in the performance of the powers herein conferred, and shall keep an accurate and permanent record of all its proceedings.

[*Powers and duties of board. Appropriation proceedings, how instituted.*]

SECTION 7. [*Section 2976-7.*] Such board shall have power to acquire lands within such district for the conservation of the natural resources of such district, and to that end may create parkways, parks and other reservations of land, and develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation. In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations insofar as such proceedings are applicable. Either the fee or a lesser interest in the lands may be acquired, as the board may deem advisable.

[*Agreement with other public authorities in control and improvement.*]

SECTION 8. [*Section 2976-8.*] Said board may also, by agreement with the council or other public authority in control of parks or park lands within any municipality in the

district, assume control of all or a portion of any existing parks or park lands within such municipality; and in such event, such parks or park lands may be developed, improved and protected as in case of lands otherwise acquired by said board; provided, however, that nothing herein shall authorize said board to acquire or control any park, park lands, parkways, play grounds, other lands or boulevards owned or controlled by any other public authority except by agreement as above provided.

[*Cost of improvement, how assessed and collected.*]

SECTION 9. [*Section 2976-9.*] In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in excess of fifty per cent of such total cost, upon abutting, contiguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable.

[*Tax levy; power to borrow in anticipation of collection.*]

SECTION 10. [*Section 2976-10.*] Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate,

and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy, which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill.

[*Unexpended balances transferred and available; books, records, surveys, etc.*]

SECTION 11. [*Section 2976-10a.*] All unexpended balances of funds heretofore levied, or collected, under the provisions of section 2976-4 of the General Code, shall be transferred to the credit of, and shall be available for expenditure by, the board herein provided for, to the extent that such funds shall have been collected from territory included within such park district. Any balance of such fund not so collected, shall be transferred to the general fund of the county. All records, surveys and other property or information acquired pursuant to the provisions of section 2976-2 to section 2976-10 of the General Code shall also be delivered to, and become the property of said board, to the extent that they relate to lands within such district. If such records, surveys, other property and information were acquired with funds produced in part from tax levies upon property located outside said district, the amount of such funds shall be ascertained and paid by said board into the county treasury to the credit of the general fund of the county.

[*Funds shall be kept in depositories; county treasurer and auditor ex-oficio officers; duties.*]

SECTION 12. [*Section 2976-10b.*] All funds under the control of said board shall be kept in depositories selected in the manner provided for the deposit of county funds, insofar as such proceedings are applicable, and such deposits shall be secured as provided in case of county funds. The treasurer of the county wherein said district is located shall be the custodian of the funds of the board and shall be an ex-officio officer of said board. He shall pay the said funds out upon the warrant of the auditor of the county wherein said district is located. The auditor of the county in which said district is located shall be an ex-officio officer of the board and no contract of said board involving the expenditure of money, shall become effective until the auditor certifies that there are funds of said board in the county treasury and otherwise unappropriated, sufficient to provide therefor. The auditor shall issue warrants to the treasurer to disburse the funds of the board upon order of the board, evidenced by the certificate of the secretary in such manner as the bureau of uniform accounting may prescribe. The accounts of said board shall also be kept in the manner to be prescribed by said bureau.

[*Removal of commissioners; procedure; vacancy.*]

SECTION 13. [*Section 2976-10c.*] Each of said commissioners shall be subject to removal at the discretion of the probate judge, either upon complaint filed with such judge, or upon his own motion No such removal shall be made, however, without giving such commissioner not less than ten days' notice and a full opportunity to be heard in his own behalf, which hearing shall be public. The order removing such commissioner shall state the reasons therefor and shall be entered upon the records of the probate court. In case of such removal, or in case of other vacancy in the office of commissioner, the vacancy shall be filled by the probate judge by appointment for the unexpired term.

[*Repeals.*]

SECTION 14. Sections 2976-1, 2976-2, 2976-3, 2976-4, 2976-5, 2976-6, 2976-7, 2976-8, 2976-9 and 2976-10 of the General Code be and the same are hereby repealed.

E. J. HOPPLE,
Speaker of the House of Representatives.

EARL D. BLOOM,
President of the Senate.

Passed March 6, 1917.

The attached bill was presented to the Governor on March 7, 1917, and was not signed or returned to the house of origin within ten days after said bill was so presented, exclusive of Sundays and the day said bill was presented, and was filed in the office of the Secretary of State March 27th, 1917.

PRICE RUSSELL,
Veto Clerk.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 27th day of March, A. D. 1917.

27G.

108 Ohio Laws, Part 2, Page 1097.

AN ACT

To amend sections 2976-1 and 2976-7 of the General Code and to supplement section 2976-10c of the General Code by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i relating to park districts and providing for the annexation of territory thereto, for the sale of lands for the levying of taxes, for the issue of bonds and conferring certain police powers upon boards of park commissioners.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 2976-1 and 2976-7 of the General Code be amended to read as follows, and that section 2976-10c be supplemented by the enactment of sections 2976-10d, 2976-10e, 2976-10f, 2976-10g, 2976-10h and 2976-10i as follows:

[*Park districts may be created to encourage forestry, etc.*]

Sec. 2976-1. In order to encourage forestry to provide for converting into forest reserves lands acquired for that purpose and to provide for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, park districts may be created as herein provided. Such park districts may include all or a part only of the territory within a county, and the boundary lines thereof shall be so drawn as not to divide any existing township or municipality within such county.

[*Acquisition of addition of lands, lakes, streams, etc.*]

Sec. 2976-7. Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, pathways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation.

[*Appropriation proceedings.*]

In case of appropriation, the proceedings shall be instituted in the name of the board, and shall be conducted in the manner provided for the appropriation of private property by municipal corporations in so far as such proceedings are applicable. Either the fee or any lesser interest may be acquired as the board may deem advisable and the provisions of this section shall apply to districts heretofore created.

[*Annexation of adjacent or contiguous territory; procedure.*]

Sec. 2976-10d. When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows. Upon the filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality.

[*Powers of budget commissioners in relation to districts.*]

Sec. 2976-10e. In the event of the annexation to a park district of territory located in a county other than the

county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by section 2976-10 of the General Code, and the auditor and treasurer of the county in which such annexed territory is located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon county auditors and county treasurers by section 2976-10b of the General Code.

[*Sale or lease of lands not needed; notice.*]

Sec. 2976-10f. If the board of park commissioners shall find that any lands which they have acquired are not necessary for the purposes for which they were acquired by such board, they may sell and dispose of such lands upon such terms and conditions as they may deem advisable, and may also lease or permit the use of any lands for purposes not inconsistent with the purposes for which such lands were acquired, and upon such terms and conditions as they may deem advisable. Provided, however, that no lands shall be sold without first giving notice by publication once a week for four consecutive weeks in not less than two English newspapers of general circulation in such district of their intention to sell such lands. Such notice shall contain an accurate description of the lands in question and shall state the time and place at which sealed bids will be received for the purchase thereof and such lands shall not thereafter be sold at private sale for less than the best and highest bid so received without giving further notice as herein specified.

[*Approval of probate court.*]

Provided, however, that no such lands shall be sold at either public or private sale without the approval of the probate court of the county in which such lands are situated.

[*By-laws, rules and regulations; violation of, a misdemeanor; penalty.*]

Sec. 2976-10g. The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of

land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever, violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor, and upon conviction, shall be fined in any sum not exceeding one hundred dollars ($100) for the first offense and not exceeding five hundred dollars ($500) for a second or further offense. All fines collected for any such violation shall be paid into the treasury of such park board.

[*Powers of employes; oath.*]

Sec. 2976-10h. Such employes as the board of park commissioners may designate for that purpose shall have and may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of such board. Provided, however, that before exercising such powers, such employes shall take oath, and give bond to the state of Ohio in such sum as the board shall prescribe, for the proper performance of their duties in such respect.

[*Tax levy for use of district; submission of question.*]
[*Issue of bonds.*]

Sec. 2976-10i. Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition

to the taxes authorized by section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further that the amount of bonds so issued and outstanding at any time shall not exceed one per cent. of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent. per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the industrial commission of Ohio as provided by law.

SECTION 2. That said original sections 2976-1 and 2976-7 of the General Code be, and the same are hereby repealed.

CARL R. KIMBALL,
Speaker of the House of Representatives.

CLARENCE J. BROWN,
President of the Senate.

Passed April 9, 1919.

Passed in the house of representatives notwithstanding the objections of the Governor, January 15, 1920.

CARL R. KIMBALL,
Speaker of the House of Representatives.

Passed in the senate notwithstanding the objections of the Governor, January 15, 1920.

CLARENCE J. BROWN,
President of the Senate.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 16th day of January, A. D. 1920.

253 G.

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CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 238.

STATE OF OHIO, EX REL. PAULINE WADSWORTH,
Appellant,

vs.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY, BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT, IN CLEVELAND, ET AL.,
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Appeal from the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF THE APPELLEES.

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THOMAS M. KIRBY,
Attorneys for Appellees.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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In the Supreme Court of the United States

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Appellees.

Appeal from the Supreme Court of the State of Ohio.

BRIEF ON BEHALF OF THE APPELLEES.

STATEMENT.

This is a proceeding on appeal from a decision of the Supreme Court of the State of Ohio, and involves the alleged unconstitutionality of certain Acts of the Legislature of the State of Ohio, by virtue of which the Metropolitan Park District in Cleveland, Ohio, was created, and further challenges the validity of a certain provision of the Constitution of the State of Ohio, in relation to matters of procedure of the Supreme Court of that State.

Jurisdiction of the Supreme Court of the United States is sought, under favor of U. S. Code, Title 28, Section 237, as modified by Section 861-A, (Act of January 31, 1928, Chapter 14, 45 Statutes, 54), and Section 861-B, (Act

of April 26, 1928, Chapter 440, 45 Statutes, 466, U. S. C. Title 28, Sec. 344), upon the asserted claim that the suit is one wherein a title, right, privilege or immunity is specially set up or claimed under the Constitution.

HISTORY OF LITIGATION.

On February 16, 1926, the Appellant, as plaintiff, filed her action in the Court of Common Pleas of Cuyahoga County, Ohio, seeking to enjoin John A. Zangerle, as Auditor of Cuyahoga County, Ohio, from honoring any orders, bills or claims of any kind, presented or issued to him by the Board of Park Commissioners of the Metropolitan Park District, in Cleveland, and, further, to restrain the Commissioners from incurring obligations requiring the further expenditure of public money, upon the ground that the statutes of Ohio, by virtue of which the Park Board was created, were invalid, in that they were in contravention of certain provisions of the Constitution of the State of Ohio. Subsequently, to wit, March 8, 1926, an amended petition was filed, which recited the further claim that the statutes in question were in contravention of certain Federal constitutional guaranties.

In due course, issues were joined, and upon hearing, a decree was entered for the defendants. An appeal was prosecuted by the plaintiff below to the Court of Appeals of the Eighth District, and the case was there heard *de novo*, resulting in a decree for the defendants. Thereafter, error was prosecuted by the plaintiff below to the Supreme Court of the State of Ohio, as a matter of right, upon the theory that the case was one involving the construction of certain provisions of the Constitution of the State of Ohio. A hearing in that court resulted in an affirmance of the decree of the Court of Appeals, after an entry of which a petition for a rehearing and vacation of judgment was denied. The

appeal herein prosecuted is upon the theory that the suit is one wherein a title, right, privilege or immunity is specially set up or claimed under the Constitution and adversely decided.

This brief is respectfully submitted, in opposition to the statement of the Appellant, disclosing the basis on which it is contended that this Court has jurisdiction, consideration of which question, by an entry in the case, made by this Court on October 28, 1929, is postponed until final hearing; and also in opposition to the brief of the Appellant upon the merits of the cause.

SUBJECT OF THE SUIT.

The constitutionality of the provisions of the Ohio statutes (General Code of Ohio, Sections 2976-1 to 2976-10i) which have brought into existence the Cleveland metropolitan park system is challenged and if adversely decided will destroy an object of great public interest and benefit.

The Act was passed by the Legislature of the State of Ohio, March 6, 1917, and amended to grant further powers in 1920, in order to provide for the preservation of natural resources, and to furnish areas to be used generally by the citizens of the district, for recreational purposes.

Since the creation of the Cleveland Metropolitan Park Board, a period of over ten years, it has acquired approximately 8000 acres of land, and has expended in the administration of its affairs several millions of dollars. Under the provisions of the enactment, by virtue of which it operates, it has twice submitted to the electors of the Park District the question of tax levies, each of which has been authorized by substantial majorities, and the collection of these levies has been anticipated by bond issues, which are

in part still outstanding. The areas acquired constitute a great recreational system, and the object for which the District was created has already taken its place as one of the major public projects in this locality.

CONSTITUTIONAL VIOLATIONS COMPLAINED OF.

For a particularizing of the alleged violated constitutional guaranties, resort must be had to the Transcript of Record, which discloses that an attempt has been made to save four Federal questions.

The first is found in the amended petition (print paging 36-40). On page 40 concerning the Park Board Acts, it is claimed that the provisions thereof are such as to deny to the tax payers or electors residing within the Park District the due process of law as guaranteed by Section 1 of Article XIV of the Constitution of the United States.

A second is found in the amended petition (print paging 36-40). On page 44, concerning the Park Board Acts, is the averment of "a denial of the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution."

The same alleged violation of constitutional guaranty is found in a "motion to vacate judgment" (print paging 8-12), which it will be noted is in effect an application for a rehearing, as evidenced by "*the grounds for rehearing*" appearing on page 10, and by the prayer "*for a rehearing,*" and "*other relief*" appearing on page 12. In this instrument, page 12, it is averred that "the judgment here denies to the plaintiff in error the equal protection of the laws, as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, which the amended petition expressly invoked." Thus, it will be seen, that this is a reiteration of the same Federal claim made in the amended petition.

A third alleged violation is found in the same motion, upon the same page, where it is averred that "the entering by the Supreme Court of Ohio of a minority judgment upholding the constitutionality of a law which the judgment of the Court of Appeals has sustained, when a contrary judgment by another Court of Appeals may at the same time be affirmed here by the same vote, is a peculiarity of the Ohio Constitution and of the judicial structure of this State, which necessarily denies to litigants the equal protection of the laws, as guaranteed by Sec. 1 of the 14th Amendment to the Federal Constitution."

A fourth alleged violation is found in the same motion, at page 12, based upon the same averred "peculiarity of the Ohio Constitution," and the assertion that such a judgment does violence to the further guaranty secured by "Section 4 of Article IV of the same instrument, which assures to each State a republican form of government."

These three alleged violations of constitutional rights, concisely stated, are:

1. That the Park District Acts are invalid upon the premise that they work a denial of the due process of law and of the equal protection of the laws.

2. That the judgment of the Supreme Court of Ohio made possible through the operation of Section 2 of Article IV of the Constitution of the State of Ohio, providing that

> "No law shall be held unconstitutional and void by the Supreme Court without concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void."

"is invalid" and works a denial of the equal protection of the laws.

3. That such a judgment violates the guaranty of an assurance of a republican form of government.

ARGUMENT.

No enlargement upon these asserted grounds of violated constitutional rights is permissible by a consideration of the assignments of error or briefs of counsel and, since we shall contend that some of the alleged grounds were not timely made upon the record, we desire to emphasize the fact that the latter two recited bases on which it is contended that this Court has jurisdiction were asserted for the first time in the motion for a rehearing, filed June 5, 1929, a period of seventy days after the rendition of the *final* judgment bearing date of March 27, 1929.

For convenience of treatment, these three alleged grounds of Federal jurisdiction will be considered as follows:

I. The alleged denial of the assurance of a republican form of government effected by a judgment made possible through the challenged provisions of the State Constitution.

II. The alleged denial, by such a judgment, of the equal protection of the laws.

III. The alleged invalidity of the Park Board Acts as working a denial of the due process of law, of the equal protection of the laws, and of a republican form of government.

These in their order—

POINT I.

THE ASSERTED GROUND THAT JUDGMENT OF STATE SUPREME COURT, MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTION, LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL, DENIES REPUBLICAN FORM OF GOVERNMENT, IS UNAVAILING, BECAUSE

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)

It Was Not Timely Asserted.

As heretofore stated, this ground was not asserted in any of the pleadings, nor contended for until after the final judgment herein sought to be reviewed. It was made the subject of a pretended ground, and asserted for the first time in a motion for rehearing.

It will be noted from the record, page 6, that this motion was overruled, and where reference is made to the Journal, by page and volume, nothing further appears as to the entry. It is our contention that a denial of this motion does not constitute a decision of the constitutional question by the State Supreme Court.

"Certain propositions must be regarded as settled.

* * * * *

(2) That the title, right, privilege, or immunity must be specially set up or claimed at the proper time and in the proper way.

(3) That such claim can not be recognized as properly made when made for the first time in a petition for a rehearing after judgment."

Saywards v. Denny, 158 U. S., at 183.

"If the question is not properly reserved in the State Court the deficiency can not be supplied in either

the petition for a rehearing after judgment or the assignment of errors in this court. * * *"

Harding v. Illinois, 196 U. S. 78.

"In order to give this court jurisdiction to review the judgment of the state court it must appear that some federal right, privilege or immunity was specially set up in the state court, passed on and denied."

Consolidated Turnpike Company v. Norfolk & Ocean View Railway Co., 228 U. S. 326.

"A mere assertion in a state court of a right under the Constitution of the United States, in a petition for rehearing, affords no ground for invoking the jurisdiction of this court unless the court below, in dealing with the petition, considers and passes upon the Federal ground therein relied upon."

Bowe v. Scott, 233 U. S. 658.

"An attempt to raise federal questions through an application to file a second petition for rehearing in the state court, comes too late."

Bilby, et al. v. Stewart et al., 246 U. S., 255.

"The settled rule is that in order to give it jurisdiction to review the judgment of a state court upon writ of error, the essential federal question must have been especially set up there at the proper time and in the proper manner; and further, that if first presented in a petition for rehearing, it comes too late unless the court actually entertains the petition and passes upon the point."

Godchaux Company, Inc. v. Estopinal, et al., 251 U. S., 179, 181.

The rule of the Court, as stated by Chief Justice Taft, in *Tidal Oil Company, et al., v. Flannagan,* 263 U. S., 444, 455, is as follows:

"This court has always held it a prerequisite to the consideration here of a Federal question in a case

coming from a state court, that the question should have been raised in that court before decision, or that it should have been actually entertained and considered upon petition to rehear. *A mere denial of the petition by the state court without opinion, is not enough.*" (Italics ours)

From these authorities, it would seem to follow that the question was not properly or timely presented to the Supreme Court of Ohio, and not disposed of by it.

It matters not, in our judgment, what the pleading filed seventy days after judgment was called, whether a motion to vacate the judgment or for rehearing. It was overruled and there is nothing on the record disclosing the grounds of that action. No opinion was rendered, hence there is nothing on the record presented upon which jurisdiction of this Court can be based.

Suppose we admit that the question could not have been raised at an earlier time or in any other way. Does it follow that the Supreme Court of Ohio passed upon the conflict between Sec. 2, Art. 4 of the Ohio Constitution, and the Federal Constitution? Is it not more logical to believe that the Supreme Court of Ohio held that it was a court of limited jurisdiction, having only the powers granted it, and that it could not enlarge its powers and jurisdiction by holding invalid, a limitation placed upon its powers? Such holding is in harmony with what the court held in *State, ex rel. Jones, v. Zangerle,* 117 O. S. 507, 159 N. E. Rep. 564, wherein the court said that "the fault lies, not in the court, but in the constitutional provision." The court has referred to its inability to do otherwise in the following decisions:

Fullwood v. Canton, 116 O. S. 732, 158 N. E. Rep. 171;

Meyers v. Copelan, 117 O. S. 622, 160 N. E. Rep. 855;

Board of Education v. Columbus, 118 O. S. 295, 160 N. E. Rep. 902.

The determination of its own jurisdiction by a state court is conclusive on this Court.

Standard Oil Co. v. Missouri, 224 U. S. 270, 281.

The decision of *Fullwood v. Canton, supra,* wherein it appears that the divided action of the Supreme Court of Ohio was probably sought to be taken advantage of on a writ of error filed in this Court, held that no federal question was presented.

Fullwood v. City of Canton, 275 U. S. 484, 48 S. Ct. Rep. 31.

(b)

It Presents no Substantial Federal Question.

As to the merit of the claim that the judgment of the State Supreme Court, made possible by the limitations of the provisions of the State Constitution, affecting the State Court's power to declare laws unconstitutional, denies to the litigant a republican form of government, it would seem sufficient to say that this Court has decided and declared that it has no jurisdiction to enforce the guaranty of a republican form of government assured by Section 4 of Article IV of the Federal Constitution, for the reason that what constitutes a republican form of government within this clause of the Federal Constitution is a political question, which is solely for the consideration, determination and enforcement by the Congress.

> "The enforcement of the provision in Section 4 of Article IV of the Constitution that the United States shall guarantee to every State a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts."

Pacific States Telephone and Telegraph Co. v. Oregon, 223 U. S. 118;

O'Neill v. Leamer, 239 U. S. 244 at 248;
State of Ohio ex rel. Davis v. Hildebrant, Secretary of State of Ohio, 241 U. S. 565 at 569.

Forsyth v. Hammond, 166 U. S. 506, (at page 519):

"It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but there is nothing in the Federal Constitution to prevent the people of a State from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature. The preservation of legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of Article 4 of the Constitution, the United States are bound to guarantee to every State in this Union. And whenever the Supreme Court of a State holds that under the true construction of its constitution and statutes the courts of that State have jurisdiction over such matters, the Federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the Federal Constitution."

Mountain Timber Co. v. State of Washington, 243 U. S. 219 (at page 234):

"It is urged that the law violates §4 of Article IV of the Constitution of the United States, guaranteeing to every State in the Union a republican form of government. As has been decided repeatedly, the question whether this guaranty has been violated is not a judicial but a political question, committed to Congress and not to the courts."

POINT II.

THE ASSERTED GROUND OF A DENIAL OF EQUAL PROTECTION OF THE LAWS BY THE JUDGMENT OF THE STATE COURT MADE POSSIBLE THROUGH PROVISIONS OF STATE CONSTITUTIONS LIMITING ITS POWER TO DECLARE LAWS UNCONSTITUTIONAL IS UNAVAILING BECAUSE—

(a) It was not timely asserted upon the record;

(b) It presents no substantial Federal question.

(a)
It Was Not Timely Asserted.

What has heretofore been said under Section (a) of Point I of this brief, applies here, and if it should be contended that the decision upon the federal question *"arose out of the decision"* of the Supreme Court of Ohio, the history of the amendment of February 17, 1922, amending section 237 of the Judicial Code, (which was expressly repealed by the Act of February 13, 1925,) should be considered. In speaking of this amendment in the case of *Tidal Oil Co., et al., v. Flannagan, supra,* the Chief Justice said at page 454:

> "The intention of Congress was * * * to permit a review on writ of error in a particular class of cases in which the defeated party claims that his Federal Constitutional rights have been violated by the judgment of the state court itself, and further to permit the raising of the objection after the handing down of the opinion. * * *"
>
> "The question in such cases could not well be raised until the handing down of the opinion indicating that the objectionable judgment was to follow. This act was intended to secure to the defeated party the right to raise the question here if the state court denied the petition for rehearing without opinion."

The amendment was for the purpose of changing the law. The amendment was expressly repealed. The law then reverted to its former state, and passing upon this phase of the history of the statute, the author of the text of *Montgomery's Manual of Federal Jurisdiction and Procedure,* Third Edition, in Section 1061, page 806, says:

> "From the rule that the federal question or assertion of federal right must have been presented or asserted in the state court, it resulted that, if the judgment of such court in and of itself worked a denial of constitutional right, the injured party was without remedy, unless the state court actually entertained and considered the question upon rehearing."

Thus it is that the law is now as it was before the amendment, and as the question was raised for the first time by the petition for rehearing, and the same was merely denied, the Federal question is not saved upon the record, since in the language of this court, "a mere denial of the petition by the state court without opinion, is not enough."

(b)

It Presents No Substantial Federal Question.

The provision of the Ohio Constitution under question is Article IV, Sec. 2 and is as follows:

> "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void."

A provision of the State Constitution which applies uniformly to all citizens and residents of Ohio who desire to contest the constitutionality of any statute does not deny equal protection of the laws. If it neither differentiates between citizens or residents, or classes thereof, nor between the citizens and residents within a district of the State, it does not work an inequality in the protection of the laws.

Mr. Justice Bradley, giving the opinion of the Court in the case of *Missouri v. Lewis*, 101 U. S. 22, at page 30, says:

"Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice, it may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion. Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a State to regulate its internal affairs to deny to it this right. We think it is not denied or taken away by anything in the Constitution of the United States, including the amendments thereto. * * * If every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place, and under like circumstances.

The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States, separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side, no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States, without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States can not be essential as regards different parts of a State, provided that

in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different States are allowable in different parts of the same State.

Where part of a State is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,—trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the State government if it could not, in its discretion, provide for these various exigencies."

In the event the Constitution of Ohio had no provision for a review whatsoever by the State Supreme Court of the judgments of the several courts of appeal (each being of limited and distinct territorial jurisdiction), there would be no denial of the guaranty of equal protection of the laws, notwithstanding that the effect of the absence of such a provision might be that statutes would be enforced in certain counties of Ohio as constitutional, and ignored in others as unconstitutional; and clearly this would be true, even though there was nothing in the subject-matter of the statutes, in force or ignored, that on principles of classification afforded a basis for territorial discrimination. Justification for the enforcement of the statute in the one district, and for its being ignored in the other, so far as the Federal right is concerned, would be found in the fact that the Court of Appeals in the one district regarded the statute as constitutional, and that the Court of Appeals in the other district regarded it as unconstitutional.

If all of the courts of appeal in the State uphold the constitutionality of a given statute, their decisions are reviewed on the same basis by the Supreme Court. If all of the courts of appeal in the State hold a statute unconstitutional, those decisions are likewise reviewed on

the same basis by the Supreme Court. The different bases of decision in the Supreme Court provided for by the amendment to the State Constitution only become operative when there is a divergence in the decisions of the courts of appeal, a divergence which the State of Ohio is under no Federal obligation to prevent or cure.

In view of the fact that the provision of the State Constitution under attack can only operate to preserve the existing divergence of decision among the lower courts, and can not create divergence where none existed below, it can not be said that the position of any citizen is any worse than it would have been if the State Constitution had denied the Supreme Court any power whatsoever to reverse or affirm unconstitutional decisions of the several lower courts.

There is no existent divergency of decision, and there can be no inequality, unless and until a discrimination is worked by the happening of a contingency which may never arise.

If all the courts of appeal should decide the same question, in the same way, there could in fact be no divergency, no discrimination, no inequality.

An individual cannot show discrimination until he can definitely point to one in whose behalf the law has been decided differently. The appellant in this case cannot so do, for no different decision has been made in any other court of appeals, and all individuals in her district are affected similarly.

The mere possibility that at some time some court of appeals may decide the question differently, and that the Supreme Court may then affirm that decision, and that thereby a citizen in a different district will be affected differently than the appellant, is not enough to raise the constitutional question at this time. Such a question now is abstract and moot.

"But the Court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which can not affect the result as to the thing in issue in the case before it."

California v. San Pablo and Tulare Railroad Company, 149 U. S. 308 at 314.

"It is the settled law of this court that one who would strike down a state statute as violative of the Federal Constitution must bring himself by proper averments and showing within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the Federal Constitution."

Southern Railway Co. v. King, 217 U. S. 524 at 534.

"The plaintiff in error has no interest to assert that the statute is unconstitutional because it might be construed so as to cause it to violate the Constitution. His right is limited solely to the inquiry whether in the case which he presents the effect of applying the statute is to deprive him of his property without due process of law."

Castillo v. McConnico, 168 U. S. 674, 680.

This rule is applied in *Board of Trade of the City of Chicago, et al. v. Olsen, et al.,* 262 U. S. 1, at page 43, wherein the court refused to consider the constitutionality of a statutory provision on the ground that the execution of the provisions of the act never operated so as to put the plaintiff in danger of suffering prejudice thereunder.

We submit that there is no discrimination, either as to persons or as to locality. The first is not debatable, and if there is a discrimination at all, it is between the various districts comprising the jurisdiction of the various courts of appeal. The division into districts of a state for the

purposes of the administration of justice is legitimate, for as this Court decided in *Missouri vs. Lewis, supra,* the guaranty of the equal protection of the laws under the Fourteenth Amendment is given to individual citizens, and not to localities.

The provision of the State Constitution requiring the concurrence of six judges of the Supreme Court to deny the constitutionality of a State statute which has been upheld by a Court of Appeals, merely provides a method of review. It would, of course, have been entirely competent for the people of Ohio to provide in their Constitution that the decision of the Courts of Appeals on a constitutional question should be final. Instead of doing that, however, the people did provide that such a decision should be final *unless* it was reversed by the Supreme Court of the State, six judges concurring. Since it would have been competent for the Constitution to give entire finality to the decisions of the Courts of Appeals, it is difficult to see how this conditional finality can be held offensive to any restraint imposed by the Constitution of the United States.

For further illustration, if the Constitution of Ohio had provided that decisions of the Courts of Appeals should be final unless reversed by the unanimous decision of the Supreme Court, or by one more than a majority, or any other limitation of the same general character, it would merely have been tantamount to saying that the Courts of Appeals are to be the courts of final decision in Ohio unless their opinions are so clearly wrong that a unanimous judgment of reversal can be obtained from the Supreme Court.

It must be remembered that the judicial sections of the Constitution of Ohio were framed with the thought of cutting down the overburdened docket of the Supreme Court of the State and giving as much finality as possible to the decisions of the Courts of Appeals. Looked at in this light, it is merely an effort to give finality to the decisions of the

Courts of Appeals, but at the same time providing an ultimate remedy which will not be resorted to except in cases of manifest and incontrovertible error.

The six to one proviso applies in *every* case in the Supreme Court in which a constitutional question is involved, *except only* a case in which the Court of Appeals has held a law unconstitutional. In other words, it applies to all cases involving constitutional issues which are in the Supreme Court in consequence of the original jurisdiction of the court, and not merely to cases before the court by virtue of its appellate jurisdiction. From this it follows that the six to one proviso is the *general* provision of the Constitution and the provision permitting the Court to act by a majority vote in upholding a decision of the Court of Appeals declaring a statute unconstitutional is in fact the exception thereto.

The equal protection clause of the Fourteenth Amendment does not prevent the application by a state of different laws and different systems of judicature to its various local subdivisions.

It must be conceded that it is the right of every state to establish such courts as it sees fit and to prescribe their several jurisdictions as to territorial extent, subject matter and amount and the finality and effect of their decisions. It must be conceded that a state may adopt any system of law or judicature it sees fit for all or any part of its territory, and the diversity of law which may result in the respective districts of the state do not constitute a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

Appellant claims that Section 2 of Article IV of the Constitution of Ohio denies due process of law. It is not her contention that the judgment sustained the validity of a statute which itself denied due process of law. That is an entirely different question. It is not the judgment but the method by which it was rendered that is condemned.

Appellant's contention amounts to a claim that after a full and complete hearing in the trial court and one appellate court, a provision that in the event of a further appeal to the Supreme Court of the State on a constitutional question, the judgment of the Court of Appeals declaring a law constitutional shall not be reversed except with the concurrence of at least six of the judges of the Supreme Court, constitutes a denial of the due process of law *per se*, as a matter of procedure or of the jurisdiction of the Supreme Court of Ohio. Obviously this claim is without merit for all that is necessary to constitute due process of law as a matter of procedure is notice, fair opportunity to be heard, and the withholding of a decision until there has been a fair hearing. The right to a review is not essential to due process of law. Hence, the opportunity which is afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals satisfies all requirements of due process of law.

Reetz v. Michigan, 188 U. S. 505;
Pittsburgh, etc. Ry. Company v. Backus, 154 U. S. 421;
McKane v. Durstin, 153 U. S. 684, 687;
Rogers v. Peck, 199 U. S. 425, 429;
Plymouth Coal Company v. Pennsylvania, 232 U. S. 531.

Statutes are not to be declared unconstitutional unless they are clearly so, resolving all doubts in favor of the constitutionality of the statute and the requirement of the concurrence of six of the seven judges is but a recognition of this principle.

The soundness of the logic of any contention is often judged by its resultant effect. If the claim of the appellant is to be sustained, the resultant effect would be that the

Supreme Court of Ohio would be deprived of a part of its jurisdiction or its jurisdiction would be dictated by this Court's decree. This would be contrary to the accepted policy and law of the land to the effect that the manner of creation of a state Supreme Court, its jurisdiction and its procedure are matters over which the people of the state have exclusive jurisdiction.

> "And, as our decisions show, there is nothing in the clauses of the Fourteenth Amendment guaranteeing due process and equal protection which converts an issue respecting the jurisdiction of the state court under the Constitution and Statutes of the State into anything other than a question of state law, the decision of which by the state court of last resort is binding upon this court."

Gasquet v. Lapeyre, et al., 242 U. S. 367, at 369-70;
Iowa Central Ry. Company v. Iowa, 160 U. S. 389, 393;
Castillo v. McConnico, 168 U. S. 674, 683;
Rawlins v. Georgia, 201 U. S. 638;
Burt v. Smith, 203 U. S. 129, 135;
Standard Oil Company of Indiana v. Missouri, 224 U. S. 270, 280, 281;
DeBearn v. Safe Deposit and Trust Company, 233 U. S. 24, 34;
McDonald v. Oregon R. R. & Navigation Company, 233 U. S. 665, 669, 670;
Missouri v. Lewis, 101 U. S. 22, 30;
Mallett v. North Carolina, 181 U. S. 589;
First National Bank in St. Louis v. State of Missouri, 263 U. S. 640, 661;
American Ry. Express Co., v. Kentucky, 273 U. S. 269.

In *Standard Oil Company of Indiana v. Missouri*, 224 U. S. 270, 286, *supra*, Mr. Justice Lamar says:

> "But the power to render a final judgment must be lodged somewhere, and in every case a point is reached where litigation must cease. What that point is can be determined by the legislative power of the state for right of appeal is not essential to due process of law."

A limitation of the jurisdiction of the Supreme Court with respect to judgments rendered by the Courts of Appeals involves solely a question of state policy; this is whether the limitation took the form of vesting the Supreme Court with jurisdiction *only* to review decisions of the Courts of Appeals holding statutes unconstitutional—leaving the decision of the Courts of Appeals final in cases in which they had upheld the constitutionality of statutes—or by differentiating in the two classes of judgments by permitting the Supreme Court by a majority vote to affirm or reverse a judgment of a Court of Appeals holding a law unconstitutional and requiring more than a majority to reverse a judgment holding a law constitutional.

The following cases analogous to the situation presented in the leading case of *Missouri v. Lewis,* 101 U. S. 22, *supra,* are in accord with the decision in that case.

Hayes v. Missouri, 120 U. S. 68, holds that it is not a denial of equal protection to give to persons accused of crime in cities of a population of over 100,000, fifteen peremptory challenges to jurors while persons in other places are allowed only eight.

Gardner v. Michigan, 199 U. S. 325. Under the existing laws the method of selecting jurors was different in Wayne County than in the rest of the State. Held not a denial of equal protection.

Chappell Chemical & Fertilizer Company v. Sulphur Mines Company, 172 U. S. 474. The Maryland constitution abridges the right of trial by jury in certain cases in the City of Baltimore. Held not to deny equal protection.

Hallinger v. Davis, 146 U. S. 314. Held not to be a denial of equal protection for a law to empower the court to take a case from the jury when a party pleads guilty to the crime of murder. In other murder cases, the jury determines the degree of the crime.

O'Campo v. U. S., 234 U. S. 91. Persons accused of crime who are tried before the court of first instance in Manila were denied the right to a preliminary examination given in all similar courts elsewhere. Held proper even though the act of Congress governing the Philippines guaranteed equal protection.

It is a familiar doctrine that courts shall not lightly disturb the enactment of the legislative branch of the government. One quotation will suffice,—by Harlan, *J.*, in *Henderson Bridge Company v. Henderson*, 173 U. S. 592, at 615:

> "As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to the validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

"Too clear to admit of dispute." Is the repugnancy too clear to admit of dispute when three of seven judges deny the repugnancy? Are the people of a state to be criticised for not wishing their legislative enactments to be put to such a hazard? Are they not justified in adopting the principle expressed by Justice Harlan and making it operative through a requirement of more unanimity than a bare majority?

Furthermore, apart from the single inquiry into its legality, the wisdom or unwisdom of a legislative enactment

or constitutional requirement is not a proper subject of judicial inquiry. This principle is expressed by Chief Justice White, in the case of *McCray v. United States*, 195 U. S. 27, at 53:

> "Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

POINT III.

THE ASSERTED GROUND OF A DENIAL OF DUE PROCESS OF LAW, OF EQUAL PROTECTION OF THE LAWS, AND OF A REPUBLICAN FORM OF GOVERNMENT, BY REASON OF THE ALLEGED INVALIDITY OF THE VARIOUS PROVISIONS OF THE OHIO PARK BOARD LAW IS UNAVAILING, BECAUSE

(a) Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

(b) No substantial Federal question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

(c) No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board law the taxpayers of the district are burdened unequally.

(a)

Questions pertaining to the enforcement of the constitutional guaranty of a republican form of Government are of a political character, and as such are beyond the jurisdiction of this court.

What has hereinbefore been said under Section (b) of Point I of this brief applies here.

(b)

No substantial question is raised with reference to alleged delegation of legislative power to the Probate Judge of a county, or to non-elected park commissioners, since the constitutionality under the Federal Constitution of similar provisions in the Conservancy Act of Ohio has been established by the decisions of the Supreme Court of the United States.

Appellant's brief (pages 26 and 27) enumerates various provisions of the Ohio Park Board Law alleged to be repugnant to the due process and equal protection clauses, and to the guaranty of a republican form of government, contained in the Federal Constitution. It is impossible from a perusal of said brief to determine which of said provisions of the Ohio Park Board Law are claimed to be repugnant to the due process clause; which provisions are claimed to be repugnant to the equal protection clause, and which are claimed to be repugnant to Article 4, Section 4 guaranteeing a republican form of government to every state.

If, as contended above, there is no merit in appellant's contentions relative to denial of a republican form of government, there remains to be considered only the question of alleged repugnancy to the due process and equal protection clauses of Section 1 of the 14th Amendment.

The enumeration of points above referred to appearing at pages 26 and 27 of appellant's brief complains of four provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to the probate judge of a county; and further complains of six provisions of the Ohio Park Board Law as being an unconstitutional delegation of legislative power to non-elected park commissioners.

Following the great Dayton Flood, there was enacted in 1914 by the Legislature of Ohio the so-called Conservancy Act of Ohio, (Sections 6828-1 to 6828-79 inclusive) the constitutionality of which under the Federal Constitution has been upheld by this Court. Since there will be found in the Conservancy Act of Ohio provisions similar to every one of the aforementioned ten Ohio Park Board Law Provisions of which appellant complains, we parallel below such provisions of both acts. (Italics ours)

(Note: See appellant's brief pages 26 and 27, 2a and 2b for list of these points)

Comparison of Provisions in Ohio Park Board Law and Conservancy Act of Ohio.

OHIO PARK BOARD LAW	CONSERVANCY ACT OF OHIO
A. Duties to be Performed by Judge.	
Section 2976-2.	Section 6828-3.
"Application for the creation of such park districts shall be made to the probate judge of the county within which the district is to be located. Such application shall either be signed by a majority of the resident electors residing within the proposed district as determined by the number of electors voting at the last preceding general election within such territory, or, in lieu thereof, shall be authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district."	"Before any court shall establish a district as outlined in (G. C. 6828-2), a petition shall be filed in the office of the clerk of said court, signed either by five hundred freeholders, or by a majority of the freeholders, or by the owners of more than half of the property, in either acreage or value, within the limits of the territory proposed to be organized into a district. Such a petition may be signed by the governing body of any public corporation lying wholly or partly within the proposed district, in such manner as it may prescribe, and when so signed by such governing body such a petition on the part of the said governing body shall fill all the requirements of representation upon such petition of the freeholders of such public corporation, as they appear upon the tax duplicate; and thereafter it shall not be necessary for individuals within said public corporation to sign such a petition. Such a petition may also be signed by railroads and other corporations owning lands. And such petition may also be filed by any city or cities interested in some degree in the improvement, upon proper action by their governing bodies."

(a)

Section 2976-4.

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be *conducive to the general welfare*, he shall enter an order creating the district under the name specified in the application." * * *

(b)

Section 2976-4.

"* * * The probate judge shall have the power to amend or change the limits of the territory described in the petition at the time of the hearing upon the same, provided, that in no case shall he increase the limits or size of said district, and provided further, that in case any of the original territory be eliminated from the district as finally established, that the boundary lines of the district as finally ordered by the court shall not divide any existing township or municipality."

Section 6828-2.

"The court of common pleas of any county in this state, or any judge thereof in vacation, is hereby vested with jurisdiction, power and authority, *when the conditions stated in the third section of this act are found to exist*, to establish conservancy districts, * * *."

Section 6828-3.

"* * * Second: The necessity for the proposed work and that it will be *conducive to the public health, safety, convenience or welfare.*"

Section 6828-59.

"Lands may be included in more than one district.—The same land, if *conducive to public health, safety, convenience or welfare*, may be included in more than one district and be subject to the provisions of this act for each and every district in which it may be included, provided, that no district shall be organized under this act in whole or in part within the territory of a district already organized under this act until the court or courts determine whether the public health, safety, convenience or welfare demand the organization of an additional district, or whether it demand that the territory proposed to be organized into an additional district shall be added to the existing district; and in case the proceedings concerning two or more such districts are before the court of common pleas of two or more counties, such determination shall be as provided in the next section."

Section 6828-60.

"* * * At such conference, the several judges shall determine to what extent the several districts should be consolidated or to what extent the boundaries should be adjusted in order to most fully carry out the purposes of this act; and they shall by suitable orders make such determination effective."

Section 6828-28.

"Lands affected outside of district.—If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in

the district, they shall appraise the benefits and damages to such land, and shall file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"Notice of hearing on land excluded from or taken into district.—If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on appraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

(c)

Section 2976-5.

"Upon the creation of such district the probate judge shall appoint three commissioners, who shall take office immediately and whose respective terms, shall expire one, two and three years, respectively, from the first day of January next after the date of their appointment, and thereafter their successors shall be appointed by such probate judge for terms of three years."

Section 6828-8.

"Within thirty days after entering the decree incorporating said district, the court shall appoint three persons, at least two of whom shall be resident freeholders within the district, as a board of directors of the district—one for a term of three years, one for a term of five years, and one for a term of seven years. At the expiration of their terms of office appointment shall be made for terms of five years. The court shall fill all vacancies which may occur on the said board."

(d)

Section 2976-10d.

"When conducive to the general welfare any territory adjacent and contiguous to an existing park district, whether located within or without the county in which such district was created, may be annexed to such park district as follows: Upon the

Section 6828-28.

"If the appraisers find that lands or other property not embraced within the boundaries of the district will be affected by the proposed improvement, or should be included in the district, they shall appraise the benefits and damages to such land, and shall

filing with the board of park commissioners of a petition requesting such annexation, containing an accurate description of the territory proposed to be annexed, accompanied by an accurate map or plat of such territory, and signed either by a majority of the electors residing within such territory or by not less than fifty such electors, the board of park commissioners shall determine whether they deem it advisable that such annexation should be made. If they determine in favor of such annexation, they shall make application to the probate court of the county in which such territory is located, setting forth the fact of the filing of such petition and the reasons why it is advisable that such territory should be annexed to such park district. Any such board may of its motion file such petition in such probate court. Upon the filing of such petition, like proceedings shall be had as are provided in sections 2976-3 and 2976-4 of the General Code upon application for the creation of a park district, except that the territory so annexed may include a part only of an existing township or municipality."

file notice, in the court, of the appraisal which they have made upon the lands beyond the boundaries of the district, and to the land which in their opinion should be included in the district. The appraisers shall also report to the court any lands which in their opinion should be eliminated from the district."

Section 6828-29.

"If the report of the board of appraisers includes recommendations that other lands be included in the district, or that certain lands be excluded from the district, it shall be the duty of the clerk of the court before which the proceeding is pending to give notice to the owners of such property by publication to be made as provided in this act for a hearing on the petition for the creation of the district. Such notice to those owners whose lands are to be added to the district may be substantially as shown in the schedule herein. The time and place of the hearing may be the same as those of hearings on apraisals. To the owners of property to be excluded from the district it will be sufficient to notify them of that fact."

B. Duties to be Performed by Commissioners.

(a)

Section 2976-10g.

"The board of park commissioners shall have power to adopt such by-laws, rules and regulations as they may deem advisable for the preservation of good order within and adjacent to such parks and reservations of land, and for the protection and preservation of the parks, parkways and other reservations of land under their jurisdiction and control, and of property and natural life therein, and such by-laws, rules and regulations shall be published as provided in case of ordinances of municipal corporations before taking effect. Whoever violates any such by-laws, rules or regulations shall be deemed guilty of a misdemeanor * * *."

Section 6828-19.

"* * * the board of directors may make regulations for and may prescribe the manner of building bridges, roads or fences or other works in, into, along or across any channel, reservoir or other construction; * * *"

"* * * The construction of any works in a manner harmful to the district or to any water course therein, and in a manner contrary to that specified by the directors, shall be a misdemeanor, * * *"

Section 6828-65.

"Right to police district.—The board of directors shall have the right to *police* the works of the district, and in times of great emergency may compel assistance in the protection of such works, and shall, also, have the right to prevent persons, vehicles or live stock from passing over the works of the district in any manner which would result in damage thereto."

(b)

Section 2976-10.

"Such a board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

(c)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare." * * * "Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered * * * to hold, encumber, control, to acquire by donation, purchase or condemnation to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

(d)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reserva-

Section 6828-18.

"Said board shall also have the right to condemn for the use of the district, any land or property within or without said district. * * *"

tions and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

(e)

Section 2976-10.

"Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. * * *"

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 6828-43.

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise. This tax shall be certified to the auditors of the various counties and by them to the respective treasurers of their counties. * * *"

Section 6828-15.

"In order to effect the protection, reclamation or irrigation of the land and other property in the district, and to accomplish all other purposes of the district, the board of directors is authorized and empowered, * * * to hold, encumber, control, to acquire by donation, purchase or condemnation, to construct, own, lease, use and sell real and personal property, and any easement, riparian right, railroad right of way, canal, cemetery, sluice, reservoir, holding basin, mill dam, water power, wharf, or franchise in or out of said district. * * *"

(f)

Section 2976-7.

"Such board shall have power to acquire lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare."

Section 6828-24.

"* * * All the rights and property of the district in the waters and water courses of the district, and in their uses, shall be exercised in such manner as to promote the welfare of the district * * *."

From the above, we submit, it will be found that each provision in the Ohio Park Board Law complained of in appellant's brief as being an unconstitutional delegation of legislative power to the probate judge or to the park commissioners, has its parallel in a similar provision in the Conservancy Act of Ohio. We now proceed to refer to the sweeping decisions whereby the courts have upheld the Conservancy Act of Ohio in every detail.

By singular and significant coincidence, appellant makes no reference whatever in her brief to the case of *Orr v. Allen, et al.*, 248 U. S. 35, wherein this Court upheld the constitutionality under both state and federal constitutions, of the Conservancy Act of Ohio which like the Ohio Park Board Law, was enacted pursuant to the provisions of Article 36, Section 2 of the Constitution of the State of Ohio.

Practically all of the constitutional questions at issue as to the Ohio Park Board Law were in issue in the litigation relating to the Conservancy Act of Ohio and the decision of the Supreme Court of the United States in *Orr v. Allen, et al., supra,* in upholding the constitutionality of the Conservancy Act establishes the constitutionality of similar provisions of the Ohio Park Board Law.

The memorandum opinion by the Chief Justice in *Orr v. Allen, et al., supra,* is as follows (italics ours except as to cases cited):

> "The 'Conservancy Act of Ohio' is the name given the statute by its first section. Its seventy-nine sections are thus epitomized in the title: 'To prevent floods, to protect cities, villages, farms and highways from inundation, and to authorize the organization of drainage and conservation districts.' Ohio Gen. Code, §§6828-1 to 6828-79; Laws of Ohio, vol. 104, p. 13. The statute was admittedly designed to prevent the recurrence of the unprecedented and disastrous flood which invaded the Miami Valley in 1913. Briefly, there was

provision for drainage districts, for boards to plan, construct and maintain the works contemplated, with the right to exert eminent domain, and to raise money by taxation, by assessments for benefits, and, in some cases, by issue of bonds. Every person affected who was aggrieved was undoubtedly given ample means by the statute to test judicially his grievance.

"A district was organized embracing land along each side of the Miami River which had been flooded in 1913 or which was required for reservoir sites or for furnishing material.

"The appellant, a citizen of California owning property within this district, filed his bill to enjoin the enforcement of the statute on the ground that it was repugnant to both the constitution of the State and that of the United States. The court, organized under §266 of the Judicial Code, *in a careful and clear opinion* disposed adversely of every proposition upon which the contention was based. The injunction was refused. This direct appeal was taken.

"All the contentions rest upon one or the other or both of two propositions; (1) That the statute is unconstitutional because of some particular provision relied upon; and (2) because of the inherent want of constitutional authority by Government to exert the powers which the statute gave. The first assumes that the statute has a significance which the Supreme Court of Ohio has expressly decided it has not, and, in addition, that the constitution of the State forbids the exertion of a legislative power which the same court has expressly held the legislature possessed. The second disregards a line of conclusive decisions of this court which leave nothing open for controversy, or, which is tantamount thereto, separates expressions in opinions of this court from their context in order to give to them a meaning which the opinions do not sanction and which it has been repeatedly declared would be inconsistent with the decided cases.

"Thus concluding, we think nothing is required to dispose of the controversy but to cite the two lines

of cases referred to. (1) *Snyder v. Deeds,* 91 Ohio St. 407; *Miami County v. Dayton,* 92 Ohio St. 215; *County Commissioners v. Gates,* 83 Ohio St. 19, 34; *State ex rel. Franklin County Conservancy District v. Valentine,* 94 Ohio St. 440; (2) *Houck v. Little River Drainage District,* 239 U. S. 254, 262, and cases cited."

The syllabus in said case recapitulates the decision in the following words (italics ours):

> "The 'Conservancy Act of Ohio,' designed to prevent floods, and authorizing creation of drainage districts, and drainage improvements through administrative boards empowered to exert eminent domain, and to tax, assess for benefits, and issue bonds, affords full opportunity for testing private grievances judicially, and, *as correctly construed by the court below,* is consistent with the state and federal constitutions. 245 Fed. Rep. 486, affirmed."

The conservancy provision of the Ohio Constitution was adopted on September 3, 1912, and the Dayton flood did not occur until March 1913. Judge Wanamaker says in *County of Miami, et al. v. City of Dayton, et al.,* 92 O. S. 215, 224:

> "This amendment was adopted September 3, 1912, and reads almost like a prophecy of Jeremiah as to the terrible floods that visited different portions of the State in March of the following year."

The decision of the U. S. district court (*Orr v. Allen, et al.,* 245 Fed. 486) which was incorporated by reference into the Supreme Court opinion holds that the due process and equal protection requirements of the Constitution are satisfied for the following reasons:

> 1st. Because a state has power to require local improvements to be made which are essential to the health, comfort, safety and prosperity of the community.
>
> 2nd. Because a public use resulted from the Act which justified the exercise of the power of eminent domain and the levy of taxes.

3rd. Because the costs of the improvement were apportioned within the taxing district in a just and reasonable mode according to benefits.

4th. Because it provides notice to the landowners and a hearing upon every essential question of fact involving the creation of the district and the rights of taxpayers.

5th. Because a levy of an ad valorem tax upon the property in the conservancy district for the purpose of paying preliminary expenses does not violate the 14th Amendment to the Federal Constitution.

6th. Because the decision of the Ohio Supreme Court in *Miami County v. Dayton*, 92 O. S. 215, sustained the Act in an opinion, which though not controlling, was said by the Court to be entitled to great weight.

The decision in *County of Miami, et al. v. City of Dayton, et al.*, just referred to, was also cited with approval in the Supreme Court opinion in *Orr v. Allen, supra.* The opinion of the case, after setting forth principles similar to those adopted by the Federal Court decision in *Orr v. Allen*, makes the further statement that to delegate the power to the Common Pleas Court to organize the district is not unconstitutional. The syllabus of the court on this point reads as follows:

> "Where a power is quasi-legislative, quasi-administrative, or quasi-judicial, or so mixed in its nature that it may be regarded as a combination of all of them, the Legislature may in the first instance characterize such power and confer it either upon an existing agency of the government or an agency especially created for that purpose. There is no delegation of legislative power in the Conservancy Act violative of any constitutional provision."

The constitutionality under the Federal Constitution of the Conservancy Act of Ohio was also considered in

Silvey, et al. v. Commissioners of Montgomery County, Ohio, et al., 273 Fed. 202. The court says at page 204:

"The act in question is charged to be obnoxious in 6 different respects to the Constitution of the United States and to some 37 provisions of the Constitution of Ohio. Most of the objections urged are unimportant and even frivolous. Only those will be considered which are deemed worthy of notice.

"The bill charges that the act deprives the plaintiff and other similarly situated property owners of their property without due process of law and denies them the equal protection of the law. The fallacy of this claim has been conclusively settled by *Miami County v. Dayton*, 92 O. S. 215, 110 N. E. 726; *Orr v. Allen*, (D. C.) 245 Fed. 486 (a three-judge case), and *Orr v. Allen*, 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109. See also, *O'Neill v. Leamer*, 239 U. S. at page 253, 36 Sup. Ct. 54, 60 L. Ed. 249.

"The averment is made that the Conservancy Act, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and by conferring jurisdiction and authority on such court to establish conservancy districts, delegates legislative power to such court, and thereby violates both the state and the federal Constitution. This contention was decided adversely to plaintiff in *Snyder v. Deeds*, 91 Ohio St. 407, 110 N. E. 1068, and *Miami County v. Dayton*, 92 Ohio St. 215, 234, 235, 110 N. E. 726. Drainage or conservancy districts may, like school districts, be established by legislative sanction. The power conferred on the court of common pleas is not unlike that delegated to township trustees, county commissioners, and other bodies, authorizing them to organize districts for the construction of public improvements and for taxing or assessing the lands benefited thereby. Such enactments have almost uniformly been held to be a delegation of legislative power, not prohibited by the organic law. The propriety of delegating authority to a local court to frame a conservancy district is, in any event,

a state question. *O'Neill v. Leamer,* 239 U. S. at pages 247, 248, 253, 36 Sup. Ct. 54, 60 L. Ed. 249."

Again at page 206 the Court says:

"The Fourteenth Amendment to the Federal Constitution does not deprive the state of the power of determining whether the officers of the conservancy district shall be appointed or be elected by the people, or the duties to be performed by them; nor does it invalidate a tax levy or an assessment lawfully made by such officers for a duly authorized improvement, or deprive the district as a political subdivision of the power to levy and collect taxes or assessments to pay the amount charged against property or political subdivisions, such as municipalities, counties, or townships, within such district. *Soliah v. Heskin,* 222 U. S. 522, 32 Sup. Ct. 103, 56 L. Ed. 294."

"Without entering upon a further detailed consideration of the case, it may be said that every substantial objection now urged against the Conservancy Act and depending upon the federal or state Constitution or laws has been decided adversely to the plaintiff, as will appear from *Miami County v. Dayton,* 92 Ohio St. 215, 110 N. E. 726; *Snyder v. Deeds,* 91 Ohio St. 407, 110 N. E. 1068; *Orr v. Allen* (D. C.) 245 Fed. 486, affirmed 248 U. S. 35, 39 Sup. Ct. 23, 63 L. Ed. 109; *Koehne v. City of Dayton,* 97 Ohio St. 341, 119 N. E. 651, and from the unreported cases of *County of Miami v. Deeds,* No. 15,347, *Koehne v. Miami Conservancy District,* No. 15,779, *Blevins v. Miami Conservancy District,* No. 15,965, *Hawthorne v. City of Troy,* No. 16,653, and *State ex rel. Silvey and Blevins v. Miami Conservancy District,* No. 16,699, 130 N. E. 943, all decided by the Supreme Court of Ohio. Rarely has a law been found which has been assailed with such frequency or from so many angles. It has withstood every test. The Ohio courts for some time past, as evidenced by many cases, have treated its constitutionality as settled beyond controversy, * * *"

The following paragraphs from the syllabus recapitulate the court's decision on these constitutional points:

"The Conservancy Law of Ohio does not, as to a taxpayer of the city of Dayton, work a deprivation of property without due process of law, or deny equal protection of the law."

"The Ohio Conservancy Law, by providing for the organization and membership of the common pleas court in a district embracing territory within more than one county, and conferring jurisdiction and authority on such court to establish conservancy districts, is not invalid under the state and federal constitutions as unlawfully delegating legislative power to such court."

"The propriety of delegating authority to a local court to frame a conservancy district is a state question."

"Const. U. S. Amend. 14, does not deprive the state of Ohio of the power of determining whether officers of the conservancy district shall be appointed or elected by the people, or prescribing the duties to be performed, nor does such amendment invalidate a tax levy, or an assessment lawfully made by such officers for a duly authorized improvement."

The case of *Soliah v. Heskin, et al.*, 222 U. S. 522, at page 524, cites with approval *Prentis, et al. v. Atlantic Coast Line Company*, 211 U. S. 210, which holds that so far as the Federal Constitution is concerned a State may, by constitutional provision, unite legislative and judicial powers in the same body.

Thus, it is seen the courts have established the constitutionality under the Federal Constitution of provisions similar to those contained in the Ohio Park Board Law and the omission in appellant's brief of mention of the line of cases by which such constitutionality is established is significant.

From a comparison of the provisions of the Conservancy Act of Ohio and the Ohio Park Board law, and from a consideration of the aforementioned decisions relating to the Conservancy Act of Ohio, it is clear, we submit, that no substantial contention has been raised by appellant with reference to alleged delegation of legislative power to the probate judge, or to non elected park commissioners.

Each of the ten provisions of the Park Board Law, challenged by appellant's brief, finds its counterpart in a similar provision in the Conservancy Act.

1. The provisions of G. C. 2976-4 of The Park Board Law relative to finding that creation of district will be conducive to the general welfare, similarly appear in G. C. 6828-2 and 6823 of the Conservancy Act.

Appellant's reference to the petitioners as "self constituted" conveys an impression which is not substantiated by an analysis of The Park Board Law. G. C. 2976-2 prescribes very definite qualifications for petitioners. They must reside in the proposed district, and must constitute a majority of the electors residing therein; or in lieu of the signatures on the application, the petition may be "authorized by resolution adopted by any board of township trustees or city council, or other legislative body, of any township, village or city, within such proposed district." While the initiative must come from the electors or the legislative bodies of the governmental subdivisions in the proposed district, the applicants are no more "self constituted" than those who sign a petition under the initiative and referendum provisions of a State constitution, or in the nomination of a candidate for public office.

2. G. C. 2976-4, relative to changing the limits of the proposed district is similar to G. C. 6828-60 of the Conservancy Act.

Appellant's statement that the probate judge is given power to "mold" the boundaries of the district overstates the provision of the statute. The judge may only reduce the size of the district as provided by the Park Board Law. Appellant cites no instance where the judge has availed himself of even this limited power, nor so far as we are informed, has there ever been such an instance.

3. G. C. 2976-5 relating to appointment of park commissioners corresponds to G. C. 6828-8 of The Conservancy Act. The only distinction between the Conservancy Act requirements and the Park Board law requirements is that the former provides that two of the three board members shall be resident freeholders of the district, while the latter provides for no such qualification. No authority is cited to show that this is contrary to the Federal Constitution, and no basic reason is advanced for the contention.

4. G. C. 2976-10d, relative to expansion of district, when found to be "conducive to the general welfare" is not different in principle from G. C. 6828-28. The contention is essentially the same as appellant's first contention, referred to above.

5. G. C. 2976-10g relative to misdemeanors and police powers is in effect the same as G. C. 6829-19 and 6828-65 of The Conservancy Act wherein similar powers are given to appointive directors.

In *Soliah vs. Heskin, et al., supra,* the Supreme Court of the United States has decided that the 14th Amendment does not deprive a state of the power to determine what duties may be performed by local officers, nor whether they shall be appointed or elected by the people.

6. G. C. 2976-10 of The Park Board Law and G. C. 6828-43 of the Conservancy Act of Ohio, alike confer upon appointive officials the tax levying power.

Under The Conservancy Act, certain of the levies may be "upon the property of the district"; while others are to be "on all real property, upon which benefits have been appraised." In the litigation relating to the Conservancy Act (*Orr vs. Allen, et al.*, 245 Fed. 486; *County of Miami, et al., vs. City of Dayton*, 92 O. S. 215), the court held certain ad valorem levies on real estate only, to be in the nature of general assessments, because under the uniform rule of taxation in the Ohio Constitution, an ad valorem general tax would have had to be upon real and personal property alike. The decisions in such litigation therefore met the exigencies of the situation so far as the uniform rule of taxation then in effect in Ohio was concerned, but there is nothing in the decisions growing out of such litigation intimating that the question as to whether the 14th Amendment to the Federal Constitution was violated depended upon whether the levies were held to be in the nature of general taxes or in the nature of special assessments.

If the Federal Constitution permits the Legislature to authorize the levying of special assessments by the appointive board, it does not stay the hand of the Legislature in the matter of general taxes.

All taxation general or special is an exercise of the same sovereign power, namely, the power of taxation, and there is no basis for the claim that the one, any more than the other, violates the Fourteenth Amendment.

7. G. C. 2976-7 of The Park Board Law and G. C. 6828-18 of the Conservancy Act alike confer the power upon appointive officials to acquire land without, as well as within, the district.

Concerning the acquisition of lands *without* the district, the like power is of course generally conferred upon the different political sub-divisions, and the rights of the taxpayers are not prejudiced by the fact of the outside

acquisition, *unless* it affirmatively appears that there is an abuse of discretion. The Cleveland Airport is an illustration of the fact that suitable areas or facilities may not be available within the sub-division limits.

The virtual necessity of going beyond the subdivision limits in some cases is illustrated by the fact that the water supply of New York City and of many other cities is procured from many miles beyond the city limits. A municipality has ample authority to provide recreation areas for its inhabitants, and yet proper recreation areas may be entirely lacking within the municipal limits. There would seem to be no more basis for the proposition that a city or park district must keep within its territorial limits in acquiring land, than there would be for the proposition that it could not purchase supplies from a source beyond its boundaries.

8. The power of eminent domain is conferred upon park commissioners by G. C. 2976-7, and also upon conservancy directors by G. C. 6828-18.

9. As appears in G. C. 2976-10, and G. C. 6828-43 and 6828-15, the directors under the Conservancy Act have power to acquire lands without the district and visit the cost upon taxpayers within it to the same extent as in The Ohio Park Board Law.

10. Appellant complains that the Ohio Park Board law is repugnant to the Federal Constitution in delegating to non-elected park commissioners the legislative power to expend tax revenues for acquiring lands at discretion, and for so developing, improving and protecting them "as they may deem conducive to the general welfare."

An examination of G. C. 2976-7 shows that no unlimited discretion is given to the commissioners, but that the very sentence containing the language appellant complains of, enumerates the things which the commissioners are au-

thorized to do, and merely states that the things specified must be done "in such manner as they may deem conducive to the general welfare." The Board is empowered to acquire lands; to create parks, parkways, and other reservations; to develop, improve and protect the same; and the Act merely provides that they must do these things in such manner as they may deem conducive to the general welfare.

The Conservancy Act of Ohio contains language similar. G. C. 6828-24 enumerates certain specific things which the directors are authorized to do, and then provides that the powers therein given "shall be exercised in such manner as to promote the welfare of the district."

The power given to the Park Board Commissioners is not unlike that given to the Secretary of Agriculture by the Acts of Congress considered by the Supreme Court of the United States in the case of *U. S. v. Grimaud,* 220 U. S. 506, wherein he was authorized to:

> " * * * make such rules and regulations and establish such service as will insure the objects of such reservation * * *."

The regulations under consideration in that case having been prescribed by the Secretary of Agriculture, an *appointive* and *executive* or *administrative official* and the violation of such regulations having the force and effect of misdemeanors and being punishable by fine, the case is a direct negation of the claim that like power conferred on the Park Board is an unauthorized delegation of legislative power.

In the Ohio Park Board law the things which the board may do "as they deem conducive to the general welfare" are not less related to the objects specifically set forth in the Act than were the powers given to the Secretary of Agriculture by the Act of Congress above referred to,

which the Supreme Court of the United States held not to be an unconstitutional delegation of legislative authority.

Generally as to the delegation of power, legislative, judicial or administrative, the court uses the following language in *Miami County v. Dayton*, 92 O. S. 215 at page 234:

> "It is difficult to see how this is any more a delegation of legislative power than the appointment of receivers and the various orders of court authorizing them to continue a going concern or to sell the same and distribute the proceeds, or to appoint appraisers in any given case, or any of the numerous boards that have heretofore been appointed by courts for the purpose of carrying out the substantial provisions of various statutory proceedings. But suppose that the powers so conferred are quasi-legislative, it must be conceded they are also quasi-administrative and quasi-judicial, and in such cases where the twilight zone of distinction prevails it has always been regarded as the right and duty of the legislature to determine the nature of the function exercised and the body that should exercise it."

By analogy to provisions in the Conservancy Act of Ohio, the constitutionality of which under both State and Federal State constitutions has been sustained, all of the contentions of the appellant relating to the delegation of power to probate judges and non-elected park commissioners are forever set at rest, and the constitutionality of the Ohio Park Board law in the particulars complained of by appellant is established.

We feel that the present case is one that calls for the strict application of the rule of *stare decisis* in regard to these statutes and requires that such recognition preclude a reconsideration of the issues.

If, for any reason, the rule thus contended for is not to be applied so as to properly preclude an argument upon

the illegality of the statutes, we then urge the same reasons and adopt the same arguments as will be found in the cases which in our opinion impel a decision in favor of the appellees, viz.: *Orr v. Allen, et al.*, 248 U. S. 435; *Orr v. Allen, et al.*, 245 Fed. 486; *Sylvey, et al. v. Commissioners of Montgomery County, Ohio, et al.*, 273 Fed. 202; and *Miami County, et al. v. Dayton*, 92 O. S. 215.

(c)

No substantial Federal question is presented by appellant's contention, that by the provisions of the Ohio Park Board Law the taxpayers of the district are burdened unequally in different ways.

In the enumeration of points appearing at pages 26 and 27 in appellant's brief, sub-section (C) reads as follows:

> "(C) in burdening taxpayers of the district unequally in sundry ways."

There appears no tabulation of the points relied upon by appellant under this heading. From an examination of the record and of appellant's brief, the following appear to be the "sundry ways" to which appellant's contention may relate, although not justified upon the record facts:

(1) By permitting the board to acquire a large part of the land in any existing township, school district, or other taxing sub-division, the land acquired thereby becoming exempt from taxation so as to overburden the residue.

(2) By permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

(3) By casting upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district.

Considering these "sundry ways" in order, we respectfully submit:

(1) There is no repugnancy to the Federal Constitution in permitting the board to acquire a large part of the land in any existing township, school district, or other taxing subdivision; the land acquired thereby becoming exempt from taxation so as to over-burden the residue.

No case is cited by appellant in support of his contention nor does the record disclose facts which indicate that "a large part of the land in any existing township, school district or other taxing subdivision," has actually been acquired. Wherever property is acquired for a public purpose, both within or without a taxing district, it becomes exempt from taxation.

As a matter of fact, in the acquiring of park lands, and conserving natural resources by adding swamp lands, forest lands, etc., to the park domain, the property acquired is apt to be to a considerable extent unimproved and therefore less valuable for taxing purposes than improved property. We believe it may be fairly assumed that the taking over of such lands by the Park Board would result in a reduction in governmental expenses to an extent not unrelated to the proportional value of the lands taken as compared with the total tax duplicate of the township or village within which the lands are located.

This Court has often held that there is nothing in the Federal Constitution to prevent the state from granting exemption from taxation.

N. Y. ex rel. Metropolitan Street Railway Company v. Tax Commissioners, 199 U. S. 1;

Bell's Gap Railway Company v. Pennsylvania, 134 U. S. 232.

It has likewise been held that the State has broad discretion in the matter of creating exemptions.

Rogers v. Hennepin County, 240 U. S. 184.

At this time nothing but a moot question is presented. Obviously any church or school, as well as a park district, might acquire a whole or a substantial part of a township, but no such situation has yet occurred.

The burden does not become different in kind, but only in degree when the acquisitions are large instead of small. The objection is therefore in effect directly against the principle of *tax exemption* because the burden complained of obtains whenever there is any exemption and regardless of its extent or purpose—whether acquired for public, charitable or religious purposes.

(2) There is no repugnancy to the Federal Constitution in permitting the budget commissioners of different counties into which a park district extends to reduce in varying degrees the rate of its unvoted tax levy.

This contention is set forth at page 9 in appellant's brief, and is presumably one of the things referred to in Item "C" set forth at page 27 of said brief where it is contended that the Ohio Park Board law is repugnant to the Federal Constitution "in burdening the tax payers of the district unequally in sundry ways."

Section 10 of the Park Board Act gives to the Board the power to levy annually not to exceed 1/10th of 1 mill, subject however, to the "combined maximum levy for all purposes otherwise provided by law."

Appellant's point is that where the district is located in more than one county the budget commission of each of the counties has control over the levy as to that portion of the park district within such county; that the budget commissioners of the two counties might not act uniformly and the result would be that there would be different rates

of taxation for park purposes in different portions of the same park district.

The complete answer to the objection is found in General Code Section 5626 which is as follows:

"5626. Joint session of budget commission; adjustment of tax rate.—

Whenever a taxing district is located in two or more counties, the budget commission of the counties in which such district is located shall meet in joint session at the call of the chairman of the commission of the county wherein the greatest amount in value of taxable property in such taxing district is located, and adjust the rates of taxation for the purpose of such district so as to enforce the limitations on the tax rate prescribed by law and to produce uniform rates throughout the districts. Provided, however, that the levies for such taxing district purposes shall not be reduced by such joint budget commission below what would be required to enforce such limitation in such part of such district in which the least reduction of such levies is necessary to enforce such limitation; and such levies so fixed shall be applied uniformly throughout the district. (112 v. 423, §1 (former §5626 repealed, 112 v. 409, §40); R. S. §2821, Eff. Aug. 17, 1927.)"

Under this section it will be seen that park board levies are applied uniformly throughout the entire district. Nothing appears in the record to show the contrary.

(3) Appellant contends that the Ohio Park Board law casts upon taxpayers within the park district the entire burden of cost of a state improvement not undertaken for the special benefit of the territory included in such district; and that in this respect said law is repugnant to the Federal Constitution.

The Ohio Park Board Law was enacted by the Legislature of the State in the exercise of its police powers and

its constitutionality must be tested with reference thereto. The police powers of the state were not restricted by the conservation amendment of 1921 in Section 36 of Article 2 of the Ohio Constitution. The purpose of that amendment was to support and add to the broad powers which the Legislature had. In the Ohio Park Board Law there appears an exercise of the general police power for the advancement of the common welfare of a community combined with the exercise of the specific power conceived in the conservancy amendment.

The contention of the appellant that the result of the Ohio Park Board Law is to cast upon a particular district the burden of an improvement state-wide in its purpose is therefore, if not founded on a false premise, at least founded on an incomplete one.

The necessity for public park areas to which the people may have free and constant access is everywhere conceded. To safeguard the public health a recreational ground must be provided. When the legislature in its broad discretion adopts a procedure whereby the resident electors of any district may secure to themselves such a benefit, it is difficult to see wherein the object achieved under the law is of such a state-wide nature as to make local taxation an inequality before the law.

It is obvious that a park area in the Cleveland district will be used primarily by the residents of that district, and that the benefits resulting from the creation of the park will therefore be local rather than general.

The language of Justice Hughes in *Houck v. The Little River Drainage District*, 239 U. S. 254, at 262 applies to this situation with peculiar force.

> "In view of the nature of this enterprise it is obvious that, so far as the Federal Constitution is concerned, the State might have defrayed the entire expense out of state funds raised by general taxation or

it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made. *County of Mobile v. Kimball*, 102 U. S. 691, 703, 704. It was equally within the power of the State to create tax districts to meet the authorized outlays. The legislature, unless restricted by the state constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the courts in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the State alone. And with respect to districts thus formed, whether by the legislature directly or in an appropriate proceeding under its authority, the legislature may itself fix the basis of taxation or assessment, that is, it may define the apportionment of the burden, and its action cannot be assailed under the Fourteenth Amendment unless it is palpably arbitrary and a plain abuse. These principles have been established by repeated decisions. *Hagar v. Reclamation District*, 111 U. S. 701, 709; *Spencer v. Merchant*, 125 U. S. 345, 353, 356; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112, 167, 168; *Bauman v. Ross*, 167 U. S. 548, 590; *Parsons v. District of Columbia*, 170 U. S. 45, 52; *Williams v. Eggleston*, 170 U. S. 304, 311; *Norwood v. Baker*, 172 U. S. 269, 278; *French v. Barber Asphalt Paving Co.*, 181 U. S. 324, 343; *Wight v. Davidson*, 170 U. S. 371, 379; *Wagner v. Baltimore*, decided this day, *ante*, p. 207."

It is true that a conservation of natural resources inures to the good of the state at large. It is not true that such a conservation does not also inure to the benefit of the district within which such conservation is made. Thus the conservation of forests is one means of flood control; the proper control of submerged and swamp lands is a good health measure; the regulation of lakes may be for a recreational purpose; and the conservation of streams will improve power and drainage facilities.

Under these circumstances the 14th Amendment to the Federal Constitution does not prevent the creation of a taxing district to assume the cost of maintaining a park and conservation area. In *County of Mobile v. Kimball*, 102 U. S. 691 (1880), the Supreme Court held that it was constitutional to assess the entire cost of a harbor improvement upon a local district even though the result of the improvement was a benefit on the entire state.

In the opinion by Justice Field, the constitutional objections were disposed of in the following language (p. 703):

> "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties, or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefited by the expenditure.
>
> "It may be that the act in imposing upon the county of Mobile the entire burden of improving the river, bay, and harbor of Mobile is harsh and oppressive, and that it would have been more just to the people of the county if the legislature had apportioned the expenses of the improvement, which was to benefit the whole State, among all its counties. But this court is not the harbor, in which the people of a city or county can find a refuge from ill-advised, unequal, and oppressive State legislation."

A similar question was raised in *Charlotte, Columbia & Augusta R. R. Co. v. Gibbes*, 142 U. S. 386 (1892). In this case the statutes of South Carolina required the salaries and expenses of the State Railroad Commission to

be borne by corporations owning and operating railroads within the state. It was contended that this was a denial of equal protection because specific parties were compelled to bear the expense of an act beneficial to the state at large. The court said (p. 394):

"There are many instances where parties are compelled to perform certain acts and to bear certain expenses when the public is interested in the acts which are performed as much as the parties themselves. Thus in opening, widening or improving streets the owners of adjoining property are often compelled to bear the expenses, or at least a portion of them, notwithstanding the work done is chiefly for the benefit of the public. So, also, in the draining of marsh lands, the public is directly interested in removing the causes of malaria, and yet the expense of such labor is usually thrown upon the owners of the property. Quarantine regulations are adopted for the protection of the public against the spread of disease, yet the requirement that the vessel examined shall pay for the examination is a part of all quarantine systems. *Morgan v. Louisiana,* 118 U. S. 455, 466. So, the expense of a compulsory examination of a railroad engineer, to ascertain whether he is free from color blindness, has been held to be properly chargeable against the railroad company. *Nashville, Chattanooga & St. Louis Railway v. Alabama,* 128 U. S. 96, 101. So, where work is done in a particular county for the benefit of the public, the cost is oftentimes cast upon the county itself instead of upon the whole State. Thus, in *County of Mobile v. Kimball,* 102 U. S. 691, it was held that a provision for the issuing of bonds by a county in Alabama could not be declared invalid, although it imposed upon one county the expense of an improvement in which the whole State was interested. In such instances, where the interests of the public and of individuals are blended in any work or service imposed by law, whether the cost shall be thrown entirely upon the individuals or upon the State or be apportioned between them, is matter of legislative direction."

The terms of the Ohio Park Board law (G. C. 2976-4) make ample provision for a hearing prior to the establishment of the park district. While the act does not say in express terms that the possibility and degree of local benefits shall be considered therein, this can be assumed. The general provisions of the act including the right of resident electors to petition for the creation of a district, the right to levy taxes upon the district, the right of the probate judge to exclude portions of a proposed district after the hearing, and the fact of the hearing itself, lead to the conclusion that the Legislature must have intended the hearing to be upon the benefits which would result to the district.

For her contention that a park district under the Ohio Park Board law is a state improvement, the cost of which should not be cast upon taxpayers within the park district, appellant relies principally upon the case of *Wasson et al. v. Commissioners,* 49 O. S. 622 in which the court held invalid an act authorizing counties to raise money to secure the location of the Ohio Experiment Station as being in violation of Section 2, Article XII of the Ohio Constitution requiring that all taxes for general revenue for the state must be levied by uniform rule upon all taxable property therein. It does not appear that the court would have declared the law invalid, but for the uniform rule proviso in the State Constitution.

Furthermore, the principal consideration which induced the court in the *Wasson* case to hold that the Experiment Station was a state project was the fact that the Board having control of the Station was a State Board and that after the County Commissioners had paid to the Treasurer of State the proceeds of the local bond issue, the County authorities ceased to have any part in the future of the enterprise. The situation with respect to a park district is the

exact opposite. The district is organized, officered and controlled by the locality which finances its operations.

This conclusion is supported by *Embree v. Kansas City and Liberty Boulevard Road District,* 240 U. S. 242 (1916) in which a taxing district was established after a hearing under a statute which did not expressly provide that benefits should be determined. The court makes the following statement which seems to apply with full force to the Ohio Park Board law (p. 248):

> "True, the statute does not in terms say that lands which will not be benefited shall be excluded or that only such as will be benefited shall be included, but it does say that the court shall make such change in the proposed boundaries 'as the public good may require.' In the presence of this comprehensive direction there can be no doubt that the legislature intended to authorize and require the county court to adjust the boundaries so they would include only such lands as might be reasonably expected to be benefited by the improvement of the district roads and therefore might be properly charged with the cost of that work. That there is an inseparable union between the public good and due regard for private rights should not be forgotten."

The fact that the Park Board is empowered under the Ohio Park Board Law to acquire lands outside the district, the cost of which is assessed upon property within the district, is not a denial of equal protection.

The provision of the Ohio Park Board Law (G. C. 2976-7) which empowers the Park Board to acquire land without the district, states that it should do so "on behalf of said district." It therefore appears that the intention of the Legislature in giving the Park Board this power was to enable the Park Board to go outside the district and acquire land only when the needs within the district re-

quire them to do so. The result of their action therefore is a benefit to the district for which the district not only can, but should be taxed. Where the area outside the established district is sought to be improved for the benefit of property outside the established district there is a provision (G. C. 2976-10d) for annexing such property, and making it a part of the park district. The two provisions as thus viewed together clearly show what the Legislature intended the powers of the Park Board to be.

The situation is comparable to the dual power of a municipality to either annex property to its corporate limits or to go beyond such limits and acquire land for a golf course, industrial home, sewage disposal plant, etc.

In concluding the argument contained in her brief, appellant cites *Funkhouser, et al. v. Randolph, et al.*, 287 Ill. 94, 122 N. E. 144. The attention of the Court is respectfully called to the fact that the four paragraphs cited do not follow one another in the reported opinion, and that the conclusions contained in the third paragraph quoted in no respect apply to the facts contained in the first and second paragraphs quoted.

Moreover each of these conclusions was based on the provisions of the Illinois Constitution of 1870, and not on the Fourteenth Amendment to the Constitution of the United States as a casual reading of appellant's brief might imply.

CONCLUSION.

Summarizing the contentions of this brief, we urge the rejection of the appellant's claims upon the grounds of the untimeliness of the raising of the federal questions; the lack of substantiability thereof; the application of the rule of *stare decisis* as it relates to the similarity of issues disposed of in similar cases by this Court; the recognition

of the State's right to create its own Supreme Court and to regulate the procedure thereof; and the lack of judicial character of the questions raised in relation thereto and upon the further ground of the public policy of the State in relation to the exercise of its inherent police power.

The judgment of the Supreme Court of the State of Ohio should be sustained.

Respectfully submitted,

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CHARLES ELMORE

In the Supreme Court of the United States

OCTOBER TERM, 1929.

No. 238.

STATE OF OHIO, EX REL. PAULINE WADSWORTH,
Appellant,

vs.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY, BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT, IN CLEVELAND, ET AL.,
Appellees.

Appeal from the Supreme Court of the State of Ohio.

PETITION FOR REHEARING AND SUPPORTING BRIEF.

GEORGE D. HILE,
Attorney for Appellant.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, O.

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Appeal from the Supreme Court of the State of Ohio.

PETITION FOR REHEARING AND SUPPORTING BRIEF.

Appellant petitions this Honorable Court for a rehearing of this cause due to grave errors having been committed which a rehearing should avert in this, to wit:

First: That this Court by affirming the judgment of the Supreme Court of Ohio, holding that persons who are not elected can be clothed by the General Assembly with the sovereign legislative power to levy taxes, and that state legislation that does this neither violates the Federal Constitution or any of its provisions, nor the fundamental law of the State or Nation.

Second: That this Court affirms a judgment of the Supreme Court of Ohio, which repudiates a principle of republican form of government which requires taxes to be levied by the people's representatives and that state legislation that destroys this principle of republican government does not violate the Federal Constitution or any of its provisions, although it guarantees that principle of government to the people and the constitution of Ohio assures it to them in these words:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people: and all powers not herein delegated remain with the people." (Sec. 20 Art. 1, Ohio Constitution.)

Third: This Court holds that the provision in the Ohio Constitution, Sec. 2, Art. IV, which gives the State Supreme Court jurisdiction to consider constitutional questions but denies the majority of the members constituting the Court the right to declare a statute unconstitutional when the Court of Appeals has held it valid, does not violate the Federal Constitution, even though fundamental or natural rights are violated by the act.

BRIEF SUPPORTING ABOVE CONTENTIONS.

The Court to support its holding on the question of who can levy taxes cites *Houck vs. Little River Drainage District,* 239 U. S. 254; *Orr vs. Allen,* 245 Fed. 486, 248 U. S. 35, and *Solich vs. Heskin,* 222 U. S. 522. The first came to this Court from Missouri where the legislation complained of had been sustained but the act there assailed required the officers who were given the power to levy taxes for the district to be elected. The case in 222 U. S. 522, came to this Court from North Dakota, where the State Supreme Court, held that persons who were not elected could not levy taxes, but that persons could be appointed to levy special assessments. This judgment of North Dakota Court was affirmed

by this Court on both points, while in the case at bar the ruling is that appointees can levy taxes, and is inconsistent with that in 222 U. S. 522. In *Orr vs. Allen, supra,* assessments and not taxes was the question. The power of taxation is legislative. "This power belongs, in this country, to the legislative sovereignty, State or National." *Merwither vs. Garrett,* 102 U. S. 472, page 519. This is the law in Ohio and always has been. *State vs. Toledo,* 48 O. S. 112.

The Court's attention is called to the fact that in *Board of Tuberculosis Hospital District vs. Peters,* 253 Mo. 520, and N. D. Court, in *Vallalley vs. Grand Forks Park Commissioners,* 15 L. R. A. 61, each held appointees could not exercise the power of taxation. In *Bank vs. Commissioners of Wyandott County,* 61 Fed. 486, which United States Circuit Court affirmed, the court holds the same way. In *Michigan Central Ry. Co. vs. Powers,* 201 U. S. 245, the court clearly announces that a delegation of the taxing power to appointees would violate the Federal Constitution. When the right to representation ends, arbitrary rule begins.

Natural or inalienable rights are not created by a constitution or law. Abolish constitutions and laws and they will persist to endure. Upon them governments are erected in this country.

The provision in the Ohio Constitution that gives jurisdiction to the Supreme Court when constitutional questions are involved, but denies the majority of the members to hold an act unconstitutional which has been held constitutional by a Court of Appeals either denies due process on the equal protection of the law, for the decision is that of one judge. The appellant in the State Supreme Court by the consideration of five judges won a moral victory, but this provision which does not think nor reason, deprived appellant of a legal victory regardless of the fact fundamental rights are involved which this Court holds is a matter

which belongs wholly to the state to correct. Fundamental rights seldom fail to eventually prevail. This Court has stated that the rights are protected by the Federal Constitution. There are many cases in history that show this fundamental right was asserted by Dred Scott. This Court held it had no jurisdiction but it disposed of his claim upon the merits denying his claim and a civil war was required to reverse that judgment.

The fact that this Court has affirmed the judgment of the state court, instead of dismissing for want of jurisdiction will enable the claim being made that this Court holds that taxation by appointees is legal. A rehearing is therefore asked in behalf of equity and justice.

GEORGE D. HILE,
Attorney for Appellant.

STATE OF OHIO,
CUYAHOGA COUNTY, ss.

I, the undersigned, one of counsel in the case above, do hereby certify that this petition for a rehearing is filed in good faith and not for delay.

GEORGE D. HILE.

Sworn to before me and subscribed in my presence by George D. Hile, this 5th day of April, 1930.

H. R. SNYDER,
Notary Public.

SUPREME COURT OF THE UNITED STATES.

Nos. 237 and 238.—October Term, 1929.

State of Ohio, *ex rel.* E. H. Bryant, Appellant,
237 *vs.*
Akron Metropolitan Park District for Summit County, F. A. Seiberling, et al.

State of Ohio, *ex rel.* Pauline Wadsworth, Appellant,
238 *vs.*
John A. Zangerle, Auditor of Cuyahoga County; The Board of Park Commissioners of The Metropolitan Park District in Cleveland, Harry M. Farnsworth, et al.

Appeals from the Supreme Court of the State of Ohio.

[March 12, 1930.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These two cases were argued together and present substantially the same questions. Each suit was brought in the state court by a taxpayer attacking the validity of the Park District Act of the State (General Code of Ohio, secs. 2976-1 to 2976-10i; 107 O. L. 65-69, 108 O. L., pt. 2, 1097-1100). The one suit related to the Park District Board of the Akron District, and the other to that of the Cleveland District, and in each suit the taxpayer sought an injunction against the Park Boards, respectively, together with the auditor of the county where the Board revenues and disbursements are handled, from expending public moneys, or incurring obligations requiring such expenditure, and from taking any other official action on behalf of the district. The statute was assailed as being in violation of the constitution of the State and also of the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The validity of the act was sustained by the Court of Common Pleas, and by the Court of Appeals, of the counties where the suits were brought. On

error proceedings from these judgments, the cases were heard together in the Supreme Court of the State, and that court was divided in opinion, two of the justices holding the statute to be valid, and five of them being of the contrary view. Section 2 of Article IV of the constitution of Ohio provides that "no law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void". Accordingly, in these suits, the judgments in favor of the defendants were affirmed by the Supreme Court and, thereupon, motions were made in that court to vacate the judgments and to enter judgments of reversal. It was then alleged that the above-mentioned provision of the constitution of the State was in conflict with the Fourteenth Amendment of the Federal Constitution in that it denied to citizens of Ohio due process of law and the equal protection of the laws, and also that the provision was repugnant to Section 4 of Article IV of the Federal Constitution assuring to every State a republican form of government. The Supreme Court of the State overruled the motions, and from the judgments of affirmance, and the orders denying the motions to vacate, appeals have been taken to this Court.

The grounds for attack, under the Fourteenth Amendment, on the validity of the Park District Act relate to the organization and powers of the Park District Boards. The act provides for the presentation to the probate judge of the county of a petition for the establishment of the proposed district and, after notice and hearing, the probate judge, with or without diminishing or altering, but without enlarging, the suggested boundaries, is to enter an order creating the district, provided he finds the proceedings to be regular and that the creation of the district will be conducive to the general welfare. The probate judge is then to appoint three commissioners who are to constitute the Board of Park Commissioners of the district, being a body politic and corporate. The Board thus constituted is to have power to acquire lands within the district for the conservation of its natural resources and, to that end, may create parkways, parks and other reservations of land, and develop, improve and protect the same in such manner as they may deem conducive to the general welfare. The Board is authorized to lay assessments upon specially

benefited lands in an amount not exceeding, and in proportion to, the special benefits conferred by the development or improvement. The Board is also authorized to levy taxes upon all taxable property within the district in an amount not in excess of one-tenth of one mill upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law. On further petitions, and on the determination by the Park Board of the advisability of the annexation of additional territory, whether located within or without the county in which the district is created, the probate court of the county within which the additional territory is located, in proceedings similar to those originally instituted, may provide for such annexation. The Board is also authorized to adopt by-laws, rules and regulations for the preservation of good order within and adjacent to the parks and reservations of land under their jurisdiction and of property and natural life therein. The violation of such by-laws, rules or regulations constitutes a misdemeanor. The Board may submit to the electors of the district the question of levying additional taxes for the use of the district, declaring the necessity of such levy, the purpose for which the taxes are to be used, the annual rate proposed and the number of consecutive years that such rate shall be levied. If a majority of the electors voting upon the question favor the levy, such taxes shall be levied accordingly, provided the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. The Board is empowered to issue bonds, in anticipation of the collection of such levy, for the purpose of acquiring and improving lands.

It was insisted by the taxpayers, plaintiffs in the state court, that these statutory provisions involved an unconstitutional delegation of legislative power to the probate court and to the non-elective park commissioners. We do not consider it necessary to consider at length this objection, or the other points sought to be made against the statute under the Fourteenth Amendment, as, in view of the repeated decisions of this Court, we do not find any substantial Federal question presented. *Houck* v. *Little River Drainage District*, 239 U. S. 254, 262; *Orr* v. *Allen*, 245 Fed. 486, 248 U. S. 35; *Soliah* v. *Heskin*, 222 U. S. 522.

The question with respect to the validity, from a Federal standpoint, of the provision of the state constitution that no law shall be held unconstitutional by the Supreme Court of the State without a concurrence of at least all but one of the judges, except in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional, was not raised in these suits until after the judgments of affirmance by the Supreme Court. But it is insisted that the point could not have been taken earlier, as in advance of the affirmance on a vote of the minority the question would have been speculative. Hence, it is said that the Federal question was raised at the earliest opportunity. (*Saunders* v. *Shaw*, 244 U. S. 317, 320.) Assuming that the Federal question is thus brought here, we find it to be without merit.

As to the guaranty to every State of a republican form of government (Sec. 4, Art. IV), it is well settled that the questions arising under it are political, not judicial, in character and thus are for the consideration of the Congress and not the courts. *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U. S. 118; *O'Neill* v. *Leamer*, 239 U. S. 244, 248; *State of Ohio ex rel. Davis* v. *Hildebrant, Secretary of State of Ohio*, 241 U. S. 565; *Montana Timber Co.* v. *State of Washington*, 243 U. S. 219, 234.

As to the due process clause of the Fourteenth Amendment, it is sufficient to say that, as frequently determined by this Court, the right of appeal is not essential to due process, provided that due process has already been accorded in the tribunal of first instance. *McKane* v. *Durston*, 153 U. S. 684, 687; *Pittsburgh, etc. Railway Co.* v. *Backus*, 154 U. S. 421, 427; *Reetz* v. *Michigan*, 188 U. S. 505, 508; *Rogers* v. *Peck*, 199 U. S. 425, 435; *Standard Oil Company of Indiana* v. *State of Missouri*, 224 U. S. 270, 286. The opportunity afforded to litigants in Ohio to contest all constitutional and other questions fully in the Common Pleas Court and again in the Court of Appeals plainly satisfied the requirement of the Federal Constitution in this respect and the State was free to establish the limitation in question in relation to appeals to its Supreme Court in accordance with its views of state policy.

In invoking the equal protection clause of the Fourteenth Amendment, it is argued that the result of the application of the provision of the state constitution may be that the same statute

may be held constitutional in a case arising in one county, and unconstitutional in another case arising in another county. This point is obviously not of importance in relation to the question of the validity of the Park District Act under the Federal Constitution, as the Act of Congress makes appropriate provision for the hearing and determination by this Court of such a question where a Federal right has been passed upon by the highest court of the State in which a decision could be had. But it is said that, from the standpoint of the state constitution, the statute may operate unequally. It is unnecessary to comment on this point so far as the mere inconvenience which may be caused by possible conflicts is concerned. It is urged that the situation has been described as deplorable by the Supreme Court of the State (*Board of Education* v. *Columbus*, 118 O. S. 295) but it is not for this Court to intervene to protect the citizens of the State from the consequences of its policy, if the State has not disregarded the requirements of the Federal Constitution. In the present instance, there has been as yet no conflict of decision. The provision of the state constitution which is attacked is one operating uniformly throughout the entire State. The State has a wide discretion in respect to establishing its systems of courts and distributing their jurisdiction. It has been held by this Court that the equal protection clause of the Fourteenth Amendment is not violated by diversity in the jurisdiction of the several courts of a State as to subject matter or finality of decision if all persons within the territorial limits of the respective jurisdictions of the state courts have an equal right in like cases under like circumstances to resort to them for redress. A State "may establish one system of courts for cities, and another for rural districts, one system for one portion of its territory, and another system for another portion". *Missouri* v. *Lewis*, 101 U. S. 22, 30, 31. Different courts of appeal may be set up for different portions of the State. *Id.*, p. 33. It is thus well established that there is no requirement of the Federal Constitution that the State shall adopt a unifying method of appeals which will insure to all litigants within the State the same decisions on particular questions which may arise. *Missouri* v. *Lewis, supra; Pittsburgh, etc. Railway Co.* v. *Backus*, 154 U. S. 421, 427; *Mallett* v. *North Carolina*, 181 U. S. 589, 597-599.

Judgments affirmed.